Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

Term, 197
No. 78-13

WILLIAM F. SCHOENHUT, JR.,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MORRIS PAUL BARAN
Attorney for Petitioner

600 Penn Square Building
1317 Filbert Street
Philadelphia, Pennsylvania 19107
(215) 563-6358

Murrelle Printing Co., Law Printers, Box 100, Sayre, Pa. 18840
James M. Clark, Philadelphia Representative, MU 6-5692

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IN THE SUPREME COURT OF THE UNITED STATES

Term, 197

No.

WILLIAM F. SCHOENHUT, JR.,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, William F. Schoenhut, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in the above entitled case on April 17, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, is set out as Appendix "B". The reported Opinion of the District Court for the Eastern District of Pennsylvania, *United States v. Schoenhut,* 432 F. Supp. 470 (E.D. Pa. 1977), is set out as Appendix "C".

JURISDICTION

The order of the Court of Appeals for the Third Circuit was entered on April 17, 1978. A petition for a rehearing en Banc of the Court's decision was denied on June 5, 1978. This petition for certiorari was filed within thirty days of the order denying the rehearing. This Court's jurisdiction is involved under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. Does the double jeopardy clause bar a Government appeal from a judgment of acquittal granted after a jury verdict of guilty where the acquittal is based upon a substantive finding of insufficiency of evidence rather than upon procedural grounds?

II. Does the double jeopardy clause bar a Government appeal from a judgment of acquittal granted after a jury verdict of guilty, where a reversal by an appellate court would require additional judicial proceedings to dispose of outstanding and undecided motions for new trial and arrest of judgment filed prior to the judgment of acquittal being granted?

III. Where a bank, through its mortgage department, had granted a line of credit to a corporate customer that drew on this credit for mortgage loans to third parties, did a bank officer who was in charge of the mortgage department "endeavor to procure a loan" within the context of 18 U.S.C. §215 solely by his failure to disclose an interest in such a third party corporation where the record failed to establish that the bank had the power to refuse a drawdown by its customer if the same was accompanied by proper documentation?

CONSTITUTIONAL PROVISION, STATUTES AND RULE INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> "*** [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb ***."

2. The Criminal Appeals Act, 18 U.S.C. 3731, provides in pertinent part:

> "In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."

3. Title 18, United States Code, Section 215. The language of such statute is as follows:

> "Receipt of commissions or gifts for procuring loans
>
> Whoever, being an officer, director, employee agent, or attorney of any bank, the deposits of which are insured by the Federal Deposit Insurance Corporation, of a Federal intermediate credit bank, or of a National Agricultural Credit Corporation, except as provided by law, stipulates for or receives or consents

or agrees to receive any fee, commission, gift, or thing of value, from any person, firm, or corporation, for procuring or endeavoring to procure for such person, firm or corporation, or for any other person, firm, or corporation, from any such bank or corporation, any loan or extension or renewal of loan, or substitution of security, or the purchase or discount or acceptance of any paper, note, draft, check, or bill of exchange by any such bank or corporation, shall be fined not more than $5,000. or imprisoned not more than one year or both."

4. Federal Rule of Criminal Procedure 29(c) provides:

"If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 7 days after the jury is discharged or within such further time as the court may fix during the 7-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquital. If no verdict is returned the court may enter judgment of acquittal. It shall not be necessary to the making of such a motion that a similar motion has been made prior to the submission of the case to the jury."

STATEMENT OF THE CASE

On September 30, 1976, a Federal Grand Jury returned a five count indictment charging the petitioner, an officer of a bank, with: Count I, receiving a fee for procuring a loan from the bank in violation of 18 U.S.C. §215 (1976); Count III, willful misapplication of the bank's funds in violation of 18 U.S.C. §656 (1976); Count VI, submission of false documents to the bank in violation of 18 U.S.C. §1005 (1976); Count VIII, submission of false reports to the bank in violation of 18 U.S.C. §1005 (1976); and Count IX, conspiracy in violation of 18 U.S.C. §371 (1976).

William F. Schoenhut, Jr., the petitioner, was hired by the Central Penn National Bank (hereinafter "Central Penn") in May of 1972. His designation was Assistant Vice President. Prior to the resignation of John Jacobsen, the head of the mortgage department of Central Penn in September of 1973, the petitioner was Mr. Jacobsen's assistant. His duties were to relieve Mr. Jacobsen of many of the day-to-day operational functions within the department, also to concern himself with the origination of new business and many of the administrative functions.

William Shellum was an officer of Central Penn who was in charge of the servicing section of the mortgage department. His duties included the supervising of the group of people that serviced the mortgage loans, the collection of payments, the handling of the various documents, the wiring of funds, and checking to see that the documentation on the warehouse line was correct.

Statement of the Case

Delaware Valley Mortgage and Realty Corporation (hereinafter "Delaware Valley") was a customer of Central Penn's mortgage department. The business of Delaware Valley, was the buying, selling and servicing of residential mortgages. Delaware Valley bought mortgages only temporarily between the times of settlement and the sale to the permanent lender.

Delaware Valley had a mortgage warehouse loan at Central Penn. The purpose of the mortgage warehouse line was to receive mortgages orignated by Delaware Valley to be held for future delivery to the ultimate purchasers of those loans, financial institutions.

Mortgage warehousing was defined by Mr. John Jacobsen as follows:

> "It is a style of an extension of credit whereby a mortgage banker, an originator of the mortgage loans would pledge those mortgages as collateral for an extension of credit. The purpose being to hold those loans in a pool until they could be delivered to an eventual purchaser of the mortgages."

Mr. Jacobsen was at Central Penn at the time Delaware Valley entered into the warehouse agreement with Central Penn, and later when the agreement was amended to provide for construction loans through the line.

Delaware Valley was considered the customer of Central Penn. The relationship of lender and borrower was only between Central Penn and Delaware Valley. The mortgages or the various construction loan agreements that might be involved in the warehouse line are matters between the borrower, Delaware Valley, and those who, in

turn, borrow from Delaware Valley. Such line was guaranteed by Mullen and Lonergan Associates, Inc., the parent firm of Delaware Valley. The mortgages on the line were security for Central Penn along with notes signed by Delaware Valley. In the event of financial difficulty, Central Penn would look primarily to Delaware Valley or the parent of Delaware Valley, Mulligan and Lonergan Associates, Inc., and then look to the real estate which is secured by the liens on the mortgage.

In the spring of 1973 a tract of land near the town of Smyrna, Delaware, was for sale. This tract of land was owned by the Karlee Corporation (hereinafter "Karlee"). The Greenmeadow Holding Company purchased the stock of Karlee Corporation on July 19, 1973. The shareholders of the Greenmeadow Holding Company were Heimbecker, Nirenberg, Inverso, Pierce, and petitioner.

Heimbecker, Nirenberg and Inverso were officers of Delaware Valley, and Pierce was an employee of the same corporation. Petitioner was not an officer, director or shareholder of Delaware Valley.

The petitioner, Schoenhut owned 20% of the stock in the Greenmeadow Holding Company. He testified that this was given to him as an outright gift from Heimbecker for past services.

Financing was obtained by Karlee from Delaware Valley. Delaware Valley used the money on its warehouse line. The petitioner did not reveal his interest in Karlee by virtue of his ownership interest in the Greenmeadow Holding Company.

At the trial of this case, which was heard by a judge and jury, a motion for judgment of acquittal pursuant to

Fed. R. Crim. P. 29 (a) was made by petitioner after the conclusion of the Government's case, and such motion was renewed at the close of all the evidence. On both occasions, the Court denied such motion. The jury found the petitioner guilty on all five counts of the indictment.

Motions for new trial, arrest of judgment and acquittal pursuant to Fed. R. Crim. P. 29 (c) were timely filed by petitioner. The District Court did not decide the merits of motions for new trial or arrest of judgment, but granted the motion for judgment of acquittal as to all five counts.

The District Court found that the evidence was insufficient proof that the petitioner endeavored to procure a loan from the bank or that the bank made such a loan to Greenmeadow/Karlee through the Delaware Valley warehousing line.

The Government appealed from the order granting the motion for judgment of acquittal to the United States Court of Appeals for the Third Circuit contesting four of the five counts. The Government did not appeal the judgment of acquittal on Count VI.

On April 17, 1978, the United States Court of Appeals for the Third Circuit affirmed the judgment of acquittal on Count III, willful misapplication of the bank's funds. and vacated the judgment of acquittal on the three remaining counts.*

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* It is petitioner's contention that, on the facts of the instant case, a negative answer to Question II would affect all counts of the indictment for which the judgment of acquittal was vacated. If the evidence is insufficient to support an inference that petitioner endeavored to procure a loan or that he knowingly contributed his efforts in furtherance of a conspiracy, the conspiracy, Count IX, falls as well as Count I. If the hearsay testimony of the other con-

In reversing the judgment of acquittal on Count I the United States Court of Appeals for the Third Circuit stated: "The evidence conclusively demonstrates defendant's concealment of his interest in the venture and the true identities of the others. This concealment is a sufficient basis upon which to predicate a conclusion that defendant made a willful attempt to secure the loan to Delaware Valley." Appendix B, p. 35a.

On April 28, 1978, petitioner asked for a rehearing en banc. On May 15, 1978, the Third Circuit entered an order amending its opinion replacing the word "inaction", on line 13 of the first full paragraph on p. 21, by the word "concealment." (Appendix B, p. 35a) Petitioner then requested leave to amend his petition and said amendment was filed on May 24, 1978. The Third Circuit denied petitioner's motion for rehearing on June 5, 1978.

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spirators is held inadmissable because of insufficient evidence linking petitioner to the conspiracy, petitioner's explanation that his receipt of the Greenmeadow stock was for past services unrelated to his position at the bank is unrefuted and Count VIII also falls.

REASONS FOR GRANTING THE WRIT

The decision below raises questions that this Court has never addressed directly but only by way of dictum in *United States v. Wilson,* 420 U.S. 332 (1975); *United States v. Jenkins,* 420 U.S. 363 (1975); *Serfass v. United States,* 420 U.S. 377 (1975); *United States v. Martin Linen Supply Co.,* 430 U.S. 564 (1977). A possible conflict exists between the Circuit Court's decision and the reasoning of this Court in the above cited cases. It also raises important questions regarding the interpretation of 18 U.S.C. Sec. 215, which should be settled by this Court.

I. This Court has never directly addressed itself to the question of whether the Double Jeopardy Clause bars an appeal from judgment of acquittal, under Federal Rule of Criminal Procedure 29(c), based solely upon the insufficiency of evidence, after a jury verdict of guilty.

This Court permitted appeals in *United States v. Wilson,* 420 U.S. 332, and *Serfass v. United States,* 420 U.S. 377. Although both cases involved dispositions favorable to the defendants in the lower court, neither case involved acquittals on the merits.

In *Wilson,* the issue was a review of a post-verdict decision wherein an indictment was dismissed for prejudicial delay in bringing the defendant to trial. *Serfass* dealt with a pretrial order dismissing the indictment.

United States v. Jenkins, 420 U.S. 363, is a situation where an indictment was dismissed after a bench trial.

The basic theme that prevails in all three of the above cases is that the Double Jeopardy Clause does not prohibit an appeal providing that a retrial would not be required in the event the Government is successful in its appeal.

Not one of the above mentioned cases dealt with a Rule 29 (c) judgment of acquittal after a verdict of guilty, although in *Jenkins,* supra, 420 U.S. at 365, there is dictum to the effect that an appeal is permitted in such a situation. However, it is submitted that an adversarial presentation was lacking and an opportunity should be afforded petitioner to place this issue squarely before this Honorable Court.

In the instant case a jury convicted the petitioner of all five counts of the indictment. Petitioner had filed a motion for judgment of acquittal, after the Government presented its case, at the close of all evidence and pursuant to Federal Rule of Criminal Procedure 29 (c) after the jury verdict of guilty.

The District Court granted the motion for judgment of acquittal on all counts as the evidence presented by the Government was insufficient to sustain a conviction. The decision was not based on any pre-trial motions or procedural matters, but solely on the insufficiency of the evidence.

This Court stated in *United States v. Martin Linen Supply Co.,* 430 U.S. 564 (1977), at 575: "We thus conclude that judgments under Rule 29 are to be treated uniformly and, accordingly, the Double Jeopardy Clause bars

appeal from an acquittal entered under 29 (c) after a mistrial no less than under 29 (a) or (b)."

Rule 29 (c) is applicable where a verdict of guilty is returned by a jury, or where a jury is discharged without having returned a verdict. *Martin Linen Supply Co.*, supra, would indicate that 29 (a), 29 (b) and part of 29 (c) are to be treated differently than a judgment of acquittal after a guilty verdict under 29 (c).

It is submitted that the subject Rule 29 (a) Motion Before Submission to Jury, 29 (b) Reservation of Decision on Motion, and 29 (c) Motion After Discharge of Jury, contains no support for this distinction. If a distinction were intended, why wouldn't 29 (c) only refer to a judgment of acquittal after a jury fails to return a verdict, or at least set forth another subsection for judgment of acquittal after a guilty verdict.

Martin Linen Supply Co., supra at 573, states that a Rule 29 acquittal is a legal determination on the basis of facts adduced at the trial relating to the general issue of the case. Wherefore is there a basis for distinction? Why should a judgment of acquittal under Rule 29 (c) be treated differently from one under Rule 29 (a) or Rule 29 (b) simply because of a difference in timing on the part of a Presiding Judge? If the basis is the same for granting the judgment of acquittal the effect should be the same. Such a result is necessary to achieve even-handed treatment for defendants similarly situated.

II. A reversal of the judgment of acquittal in the instant case would require additional judicial proceedings to dispose of outstanding and undecided motions for new trial and arrest of judgment which are a bar to the Government's appeal, by virtue of the Double Jeopardy Clause, as evidenced by the spirit of this Court's decisions in prior cases.

The petitioner in the case at bar filed timely motions for judgment of acquittal pursuant to Rule 29(c), new trial and arrest of judgment after a jury trial verdict of guilty.

The District Court in the first sentence of its decision in *United States v. Schoenhut,* 432 F.Supp. 470 (1977), at 472, states: "This matter is presently before the Court on defendant's motion for judgment of acquittal, arrest of judgment and a new trial." The Court granted the defendant's motion for judgment of acquittal and did not act upon the other two motions.

A reversal of the judgment of acquittal in the instant case would not terminate the matter by merely reinstating the guilty verdict and sentencing thereon. On the contrary, further legal proceedings would have to take place to resolve the outstanding motions.

The motions for new trial and arrest of judgment would require the District Court to once again study the record, listen to arguments of all parties in interest and render decisions, a component part of which again assesses petitioner's guilt or innocence.

United States v. Scott, U.S. (1978), No. 76-1382, decided by this Court on June 14, 1978, would not

be applicable in the instant case because a reversal of the judgment of acquittal would not be of the petitioner's doing. The further litigation would be required because the Government appealed the judgment of acquittal and the motions were not previously disposed of. In the instant case, unlike *Scott,* the catalyst was the Government, not the petitioner.

The Criminal Appeals Act, 18 U.S.C. 3731, provides in pertinent part:

> "In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution . . ."

The above statute is the Government's basis for the appeal in the instant case. Aside from the double jeopardy provision which is the point of focus at this time, it is interesting to note that the statue addresses itself to "dismissing an indictment or information as to any one or more counts." The Government's appeal, however, is not based upon dismissing an indictment or information but an appeal from a judgment of acquittal. It is questionable whether the Government has statutory authority for the appeal, even without considering the double jeopardy clause admonition.

To bring the double jeopardy issue into full perspective, it is important to examine the test proclaimed by this Court in prior cases. The test was formulated without an

actual case raising as an issue the effect of a Rule 29(c) acquittal on the merits after a verdict of guilty.

In *United States v. Jenkins*, 420 U.S. 358, at 365, this Court, citing *Wilson*, set forth the test:

> "When a case has been tried to a jury, the Double Jeopardy Clause does not prohibit an appeal by the Government providing that a retrial would not be required in the event the Government is successful in its appeal. United States v. Wilson, 420 U.S. 344-345, 352-353, 43 L.Ed.2d, at 242, 246-247. When this principle is applied to the situation where the jury returns a verdict of guilt but the trial court thereafter enters a judgment of acquittal, an appeal is permitted. In that situation a conclusion by an appellate court that the judgment of acquittal was improper does not require a criminal defendant to submit to a second trial; the error can be corrected on remand by the entry of a judgment on the verdict . . ."

Wilson, supra, is inapposite to the case at bar, not only because it dealt with a motion for dismissal because of pre-indictment delay rather than an acquittal on the merits, but also because the Court never reached the issue of the constitutional ramifications of a reversal of such an acquittal on outstanding motions for new trial and arrest of judgment.

On the other hand, this Court, in *Jenkins*, supra, at 370 stated as dictum:

> "But it is enough for purposes of the Double Jeopardy Clause, and therefore for the determination of appealability under 18 U.S.C. §3731 (18 U.S.C.S. §3731), that further proceedings of some sort, de-

voted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand . . ."

This petitioner urges this Honorable Court to issue a writ of certiorari because of the far-reaching importance and complexities of this case, and its impact on many facets of the problems concerning double jeopardy.

III. The United States Court of Appeals for the Third Circuit has defined "endeavoring to procure" a loan so as to extend 18 U.S.C. Sec. 215 to acts not contemplated by Congress.

The United States Court of Appeals for the Third Circuit takes the position that petitioner perpetrated a criminal act under 18 U.S.C. Sec. 215 by remaining silent.

In order for a jury to have properly convicted petitioner under 18 U.S.C. Sec. 215, it was necessary to show that, in return for a thing of value, petitioner procured or endeavored to procure a loan by the banking institution where he was employed.

The Court of Appeals held that petitioner's failure to reveal his financial interest in Greenmeadow was sufficient to substantiate the proposition that petitioner endeavored to make a loan.

The Third Circuit supported this proposition by relying on other inferences, to wit: (1) "that Central Penn had the contractual power to exercise control . . . over the Delaware Valley warehouse line", and (2) that Central Penn's knowledge of petitioner's interest in the transaction

might have resulted in the aborting of the drawdown (Appendix B, pp. 35a-36a).

Absent proof of the contractual relationship between Central Penn and Delaware Valley, neither of these inferences follows logically from the facts adduced at trial. The fact that Central Penn could reject a drawdown by Delaware Valley on the warehouse line if the supporting documents were improper does not lead to the inference that Central Penn had any power either to prevent a drawdown by Delaware Valley where appropriate documentation was presented, or to abort a drawdown because of petitioner's interest.

Although petitioner was the supervisor and head of the mortgage department of Central Penn, the record clearly indicates that the supervision over the necessary documentation was the responsibility of another officer, to wit, William Shellum. The loan policy manual, written by petitioner and referred to by the Third Circuit as evidence of Central Penn's control (Appendix B, p. 30a, fn. 11), was not written until after the alleged violations.

Although the record establishes that petitioner had no knowledge of the fraudulent acts of the other principals in Greenmeadow and is devoid of any evidence that petitioner made any effort to induce or encourage Central Penn to grant a loan, the Circuit Court held that petitioner's failure to reveal his interest in the transaction "is a sufficient basis upon which to predicate a conclusion that defendant made a willful attempt to secure the loan to Delaware Valley." (Appendix B, p. 35a).

18 U.S.C. Sec. 215 does not lend itself in any way to the inference that petitioner's failure to reveal his interest

in the transaction is tantamount to a "willful attempt" to procure a loan. Furthermore, as a penal statute, its terms should be strictly construed. Mr. Justice Holmes, speaking for the Court in *McBoyle v. United States,* 283 U.S. 25, at 27, stated that "although it is not likely that a criminal will carefully consider the text of the law, it is reasonable that a fair warning should be given to the world in language that the common world would understand of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible, the line should be clear . . ." In *United States v. Universal Corp.,* 344 U.S. 218, 221-222 (1952), Mr. Justice Frankfurter stated:

> "Not that penal statutes are not subject to the basic considerations that legislation like all other writings should be given, insofar as the language permits, a common-sensical meaning. But when choice has to be made between two readings of what Congress has made a crime, it is appropriate, before we choose the harsher alternatives, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implications."

In the instant case, the Third Circuit has extended the definition of "endeavoring to procure" a loan within the context of 18 U.S.C. Sec. 215 to include any situation where a bank officer fails to reveal that he might benefit indirectly from a transaction with his bank even though this transaction is not of his doing. Such an interpretation would make the failure to reveal a possible indirect benefit rather than the act or intention to commit the act the gravamen of the crime. To permit this extended definition to stand would create havoc with banking institutions

throughout the country and result in numerous unwarranted prosecutions.

CONCLUSION

It is therefore respectfully submitted that a writ of certiorari should issue to review the decision of the Third Circuit.

Respectfully submitted,
MORRIS PAUL BARAN,
Attorney for Petitioner

APPENDIX "A"
ORDERS ENTERED BY THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
for the Third Circuit

No. 77-1793

UNITED STATES OF AMERICA,
Appellant

vs.

SCHOENHUT, WILLIAM F., JR.

(D. C. Crim. No. 76-472-2)
On Appeal From the United States District Court for the Eastern District of Pennsylvania

Present: Rosenn and Higginbotham, *Circuit Judges,* and Barlow, *District Judge.**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on January 3, 1978.

*George H. Barlow, United States District Judge for the District of New Jersey, sitting by designation.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed May 10, 1977, be, and the same is hereby affirmed as to count III of the indictment. The said judgment of the said District Court as to counts I, VIII and IX be, and the same is hereby vacated and the cause remanded to the said District Court with instructions to reinstate the jury's verdict of guilty on those counts, all of the above in accordance with the opinion of this Court.

ATTEST:

Thomas F. Quinn
Clerk

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 77-1793

UNITED STATES OF AMERICA,
Appellant

v.

WILLIAM F. SCHOENHUT, JR.

D. C. Crim. No. 76-472-2

Present: Rosenn and Higginbotham, *Circuit Judges,* and Barlow, *District Judge*

ORDER AMENDING OPINION

It is ORDERED that the opinion in the above-entitled case be and is hereby amended as follows:

Page 21, first full paragraph, line 13, delete the word "inaction" and substitute therefor the word "concealment."

By the Court, .
Max Rosenn
Circuit Judge

Dated: MAY 15 1978

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

May 17, 1978

No. 77-1793

UNITED STATES OF AMERICA,

Appellant

vs.

SCHOENHUT, WILLIAM F., JR.

(D. C. Crim. No. 76-472-2)

Present: Rosenn, *Circuit Judge.*

1. Petition by appellee for leave to amend petition for rehearing en banc and to grant them 14 days from May 15, 1978 (May 30, 1978) to file the amended petition, and to withhold decision of appellee's present petition pending before the Court en banc until the amended petition is received and studied by the Court,

—the above-entitled case. The opinion was filed and the judgment entered on April 17, 1978.

Respectfully,

(s) T. F. Quinn

Clerk

—If any answer, due by May 24, 1978, is received it will be forwarded immediately to you.

—foregoing Motion is/are granted except that the amended petition shall be filed not later than May 26th, 1978.

By the Court,
(s) Max Rosenn
Judge

Dated: May 19, 1978

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 77-1793

UNITED STATES OF AMERICA,
Appellant

v.

WILLIAM F. SCHOENHUT, JR.

SUR PETITION FOR REHEARING

Present: Seitz, *Chief Judge,* Aldisert, Adams, Gibbons, Rosenn, Hunter, Weis, Garth, and Higginbotham, *Circuit Judges,* and Barlow, *District Judge*

The petition for rehearing and amendment to petition for rehearing filed by William F. Schoenhut, Jr., Appellee, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing and amendment to petition for rehearing are denied.

By the Court,
(s) Max Rosenn
Judge

Dated: June 5, 1978

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 77-1793

UNITED STATES OF AMERICA,
Appellant

vs.

WILLIAM F. SCHOENHUT, JR.

Pursuant to Rule 41 (b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until July 5, 1978.

(s) Max Rosenn
Circuit Judge

Dated: June 8, 1978

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

June 12, 1978

No. 77-1793

UNITED STATES OF AMERICA

vs.

SCHOENHUT, WILLIAM F., JR.

(D. C. Criminal No. 76-472-2)

Present: Rosenn and Higginbotham, Circuit Judges, and Barlow, District Judge*

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1. Appellee's Motion for leave to have transcribed the oral argument before this Court of the above-entitled case on January 3, 1978 and to make same part of the record of this case.

Any answer received timely (by June 16, 1978) will be forwarded promptly to you.

Respectfully,
(s) T. F. Quinn
Clerk

enc.
mef

The foregoing Motion, insofar as it requests leave to have transcribed the oral argument before this court, is granted. That portion of the motion requesting the transcription to be made a part of the record of this case is denied inasmuch as the transcript of oral argument will be prepared by the appellant's transcriber and not the court.

By the Court,
(s) Max Rosenn
Judge

Dated: June 14, 1978

APPENDIX "B"

OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 77-1793

UNITED STATES OF AMERICA,
Appellant

v.

WILLIAM F. SCHOENHUT, JR.

Appeal From the United States District Court for the Eastern District of Pennsylvania

D. C. Crim. No. 76-472-2

Argued January 3, 1978

Before Rosenn and Higginbotham, *Circuit Judges*, and Barlow, *District Judge**

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*George H. Barlow, United States District Judge for the District of New Jersey, sitting by designation.

DAVID W. MARSTON
United States Attorney

WALTER S. BATTY, JR.

PETER J. SMITH
Assistant United States Attorneys
3310 United States Courthouse
601 Market Street
Philadelphia, Pa. 19106
Attorneys for Appellant

MORRIS PAUL BARAN
600 Penn Square Building
1317 Filbert Street
Philadelphia, Pa. 19107
Attorney for Appellee

OPINION OF THE COURT

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ROSENN, *Circuit Judge*

In response to a lack of public trust in banking fostered during the Great Depression, Congress enacted legislation to protect the integrity of federally insured banks. Criminal penalties were included in this legislation to prevent actions of bank officers and other employees contrary to the public interest. The defendant, William F. Schoenhut, Jr., an officer of a federally insured bank, was found guilty by a jury of five counts of an indictment charging him with violations of his duty to the bank and the public. Following the verdict, the district judge granted a judgment of acquittal in favor of defendant on all five counts.[1] We vacate that judgment, reinstating the verdict as to three of the counts.

I. FACTS

This was a complicated criminal action arising out of intricate banking transactions, generated by avarice, and aided by an executive employee's deception and disloyalty. A brief description of the facts adduced at trial is essential

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[1] Defendant was convicted of: count I, receiving a fee for procuring a loan from the bank, in violation of 18 U.S.C. §215 (1976); count III, willful misapplication of the bank's funds, in violation of 18 U.S.C. §656 (1976); count VI, submission of false documents to the bank, in violation of 18 U.S.C. §1005 (1976); count VIII, submission of false reports to the bank, in violation of 18 U.S.C. §1005 (1976); and count IX, conspiracy, in violation of 18 U.S.C. §371 (1976). The Government does not appeal the judgment of acquittal on count VI.

to assess the district court's judgment. Because this is an appeal from a judgment of acquittal, the Government is entitled to have the evidence viewed in the light most favorable to the verdict. *See United States v. Anderson*, 532 F.2d 1218, 1223 (9th Cir. 1976); *United States v. Schmidt*, 471 F.2d 385, 385-86 (3d Cir. 1972) (per curiam), *citing, United States v. Feldman*, 425 F.2d 688, 692 (3d Cir. 1970).

Taking the evidence in the light most favorable to the Government, the jury could have found the following. From sometime in 1972 until August of 1973, the defendant served as an Assistant Vice President in the mortgage department of Central Penn National Bank ("Central Penn") under the immediate supervision of the Vice President, John Jacobsen. In September of 1973, defendant succeeded Mr. Jacobsen as the head of the mortgage department and was charged with responsibility for the day-to-day operations of the department, administration, and the origination of new business. During this period, defendant had substantial dealings with H. Gerard Heimbecker, David Pierce, Ronald Nirenberg, and Philip Inverso, all of whom were officers or employees of Delaware Valley Mortgage and Realty Corporation ("Delaware Valley"), a customer of Central Penn's mortgage department.

Delaware Valley was a mortgage broker which had its principal office in Philadelphia, Pennsylvania, with at least one branch office located in Wilmington, Delaware. It was wholly owned by a parent firm known as Mullin and Lonergan, Associates, but was managed by Heimbecker, Nirenberg, and Inverso who reported to the parent. Delaware Valley was in the business of buying, selling,

and servicing of mortgages, and to a lesser extent, the financing of construction projects. Generally, it acted as a middle man, purchasing mortgages through realtors and other agents at a certain interest rate and then reselling them at a lower interest rate to financial institutions, which would act as the permanent lenders.

Delaware Valley purchased mortgages only on an interim basis, between the time of settlement on the real estate and the eventual sale of the mortgage to a permanent lender. In this period it needed extensive amounts of capital to finance its short term purchases. To obtain such financing, Delaware Valley entered into a mortgage warehousing agreement with Central Penn.

Mortgage warehousing is a form of extension of credit whereby institutions such as Delaware Valley obtain financing from banks on a short term basis, using mortgages as collateral. Under this system, Central Penn established a line of credit for Delaware Valley in 1972—initially $500,000, subsequently raised to $2,000,000—which allowed Delaware Valley quick access to short term financing. At settlement on the purchase of a parcel of property, Delaware Valley would write out a check on the warehouse account, not to exceed its credit limit, to accomplish closing. This check, along with a demand collateral note in Central Penn's name, the mortgage agreement between Delaware Valley and the mortgagee, other required papers, and a commitment letter from a permanent lender indicating permanent financing for the project, would then be sent to the bank. Whenever the permanent lender purchased the mortgage from Delaware Valley, the Central Penn loan would be repaid, the mortgage transferred to the permanent lender, and the appropriate

amount reinstated to the credit line. Testimony indicated that the Central Penn mortgage department handled the Delaware Valley warehouse line and that the defendant had supervisory responsibility to insure the proper operation of the department.[2]

Sometime in the spring of 1973, David Pierce, the manager of the Delaware branch of Delaware Valley, advised Heimbecker, Inverso, and Nirenberg that there was a parcel of land in Smyrna, Delaware, owned by the Karlee Corporation ("Karlee"), which would be suitable for development by Delaware Valley. On past occasions, Delaware Valley had purchased such undeveloped land with the intention of finding builders to construct homes on the sites. On this occasion, however, Heimbecker, Inverso, Nirenberg, and Pierce, all of whom were either officers or employees of Delaware Valley at the time decided that they would attempt to develop the land themselves for their personal profit. They thought they could obtain financing for this project, both for the purchase of the new land and the construction of the homes, directly from Central Penn.

The defendant was brought into this venture sometime in the spring of 1973. He made inspections of the

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[2] The district court was most concerned with the failure of the Government to introduce documentary proof of the operation of the warehouse line. United States v. Schoenhut, 432 F. Supp. 470, 472 (E.D. Pa. 1977). However, sufficient testimony of reliable witnesses established the line's operational features. Mr. Jacobsen, Mr. Inverso, and the defendant all testified as to the structure of the Central Penn-Delaware Valley participation, including the requirement of a bona-fide commitment letter and the supervisory rule of the defendant.

building site and had discussions with Heimbecker and the others about methods of financing the project. He made it clear that Central Penn could not grant a loan on the project directly to Heimbecker and his associates. The exact reason for this is not certain. Defendant suggested that the loan could not be made because the land was too far from Central Penn for adequate inspections, but it appears more likely that the actual reason the bank would not make the loan was because the officers had contributed only minimal capital to the project and the property constituted mere raw land. Instead, defendant agreed with and supported Heimbecker's proposal that they manipulate the Delaware Valley mortgage warehouse line to finance the purchase and development of the land.

Later that spring, Heimbecker, Pierce, Inverso, and Nirenberg formed the Greenmeadow Holding Company ("Greenmeadow"), a corporation whose sole purpose was to purchase the capital stock of Karlee and thereby acquire control of its land. Shares in Greenmeadow were alloted to each of these individuals and to the defendant. The exact allocation at the time of formation was disputed, but taking the evidence in the light most favorable to the Government, it appears that the defendant initially received a 10 percent share of the stock while the others each received 22.5 percent. Eventually, defendant's share was put in parity with the other shareholders.[3]

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[3] Although defendant made no capital contribution to Greenmeadow, he received shares in the company. He testified that this was a gift from Heimbecker because of their past relationship; however, hearsay testimony was introduced at trial that Heimbecker told the others that the defendant was given his initial shares because of his

On July 19, 1973, settlement was held in Philadelphia at which Greenmeadow purchased all of the Karlee stock. As security for this sale, the Greenmeadow principals, including the defendant, pledged the Karlee stock to its former owners.[4] That same afternoon, Delaware Valley granted a construction loan to Karlee in the amount of $1,495,400, holding a mortgage on the Greenmeadow/Karlee property as security. All of the documents evidencing this transaction were signed falsely by persons purporting to be the Greenmeadow principals. These forgeries were made to prevent Mullin and Lonergan Associates from discovering that Delaware Valley officers had a financial interest in Greenmeadow and that they were involved in the construction loan from Delaware Valley. Defendant had no knowledge of these forgeries, although he certainly understood that the principals of Greenmeadow were in fact the officers of Delaware Valley.

In connection with this settlement, Delaware Valley drew a check on its warehouse account for $150,750 to be used by Greenmeadow to purchase the Karlee stock. This check was secured by the mortgage between Delaware Valley and Greenmeadow/Karlee. All of the documents between Greenmeadow/Karlee and Delaware Valley, including the fraudulent loan papers, were for-

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efforts in securing the loan for Greenmeadow through the Delaware Valley warehouse line. Defendant later was made an equal shareholder as compensation for later services rendered to the others. *See* n.5, *infra.*

[4] Greenmeadow had no other assets beside the Karlee stock and a small amount of up-front money provided by Nirenberg.

warded to Central Penn as part of the warehouse line transaction. On July 20, 1973, Central Penn's mortgage department credited Delaware Valley's warehouse account with $150,750 as an advance on stage one of the Greenmeadow/Karlee construction loan.

On August 15, 1973, Nirenberg initiated a request to Central Penn for another advance of $90,450, purportedly for use in construction of water and sewer lines in the Karlee development. Central Penn wired funds directly to a Karlee account at another bank, even though the request was made through the Delaware Valley warehouse account. Apparently, Nirenberg, Heimbecker, and Inverso diverted the use of those funds for their own personal purposes and did not fully expend the sums on the development. The evidence established with certainty that between July 1973 and August 1974 Central Penn actually paid out approximately $620,000 on account of the loan through the warehouse line.

In late September 1973, a routine audit of the mortgage department at Central Penn disclosed that certain of the commitment letters submitted to the bank by Delaware Valley as security for various transactions financed through the warehouse line had expired. The defendant, upon being notified of this problem, promised to rectify the situation. A follow-up audit revealed that sometime after September defendant post-dated several Delaware Valley collateral notes so that they fell due five days before the expiration of the commitment letters.

After the initial audit, defendant met with Heimbecker to discuss the auditor's discovery of the expired commitment letters. Defendant agreed to talk to the bank

to see if he could arrange that extra time be given to Delaware Valley to enable it to work out its problems.[5] He told his superiors that there was a problem with the Delaware Valley warehouse line, that certain mortgages were supported with improper commitment letters. Defendant misinformed the bank that the problem was not with Delaware Valley. Based on this assurance, the bank gave an extension of time to Delaware Valley to correct the problem. Subsequently, a further extension was given.

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[5] Pierce testified that Nirenberg told him that the defendant's share in Greenmeadow was increased because of his intervention on behalf of the other Greenmeadow principals during the audit at Central Penn. Nirenberg stated that Heimbecker told him that the increase was to equalize the defendant's share of Greenmeadow with the others. Inverso testified as well to the equalization of the number of shares stating that Heimbecker told him that the defendant would make every effort to help resolve the audit problem. Inverso further testified that as a result of defendant's actions, the defendant was to receive an equal amount of stock—increased from a 10 percent share to a 20 percent share. All of this testimony was admitted at trial, along with certain other hearsay testimony of Heimbecker, *see* n.3, *supra,* under the theory that the statements of co-conspirators may be admissible against the others once the existence of the conspiracy is independently demonstrated. The trial judge in his opinion on the judgment of acquittal disregarded this testimony because he concluded that there was insufficient independent foundation for proof of the conspiracy. United States v. Schoenhut, *supra,* 432 F. Supp. at 481-82. We hold later in this opinion that the testimony was admissible and that proof of the conspiracy was independently established. *See* part V, *infra.*

On October 4, 1973, defendant wrote a memorandum to his bank superiors that indicated the Delaware Valley problem had been caused by "an overzealous employee" of one of the permanent lending institutions. Truthfully, as was discovered later, it was Delaware Valley's officers that had committed extensive irregularities involving false commitment letters, and who had submitted fraudulent requests on construction loans as well, including false claims for the Karlee site.

Only three sample homes were ever completed at the Karlee development. No inspections were ever made by Central Penn after the funds were forwarded to Delaware Valley on the warehouse line.[6]. In order to obtain loan advances, Karlee and Delaware Valley were required to submit sales agreements on homes built and sold on the site. Nirenberg submitted fictitious agreements to obtain money from the bank. Furthermore, Nirenberg and Inverso had also embezzled money from Delaware Valley through a scheme involving false mortgage docu-

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[6] Testimony at trial indicated that Central Penn would customarily inspect only the sites of companies which received direct construction loans from the bank. Other testimony, however, indicated that even in the case of a construction loan made through another company's warehouse line, the bank could make inspections, although ordinarily it would look first to the primary debtor on the line. Defendant, as the head of the bank's mortgage department, prepared a manual on the bank's construction loan and inspection policies. The manual provided explicit instructions for bank procedures and inspections and stated that deviations would have to be approved in person by William F. Schoenhut, Jr., the defendant. The manual applied to all loans made on warehouse lines.

ments, which although discovered by Heimbecker in 1973, was not disclosed to the bank for another year. Funds advanced by Central Penn for Karlee through the Delaware Valley line were frequently converted by Nirenberg and Inverso to make restitution to Delaware Valley for the other embezzlements.

On November 23, 1973, the defendant answered a conflict of interest questionnaire distributed by the bank. He stated that he did not have any interest, financial or otherwise, in any customer of the bank; that he did not receive any gifts or benefits from any customer of Central Penn; and he denied that he had acquired any stock, securities, or property available to him solely because of his employment with Central Penn.

In August of 1974, defendant revealed to the bank for the first time his interest in the Greenmeadow/Karlee group. His employment was terminated shortly thereafter. Eventually, after the entire scheme was uncovered, the bank foreclosed on the Karlee development and suffered substantial losses on the project.

With this factual background, defendant was convicted of the following counts of the indictment:

(1) *Count I*—knowingly and unlawfully receiving stock in Greenmeadow for endeavoring to procure a loan from Central Penn to Karlee through the Delaware Valley warehousing line;

(2) *Count III*—knowingly and unlawfully misapplying the funds of Central Penn in arranging the loan to Karlee and knowing of the forged documentation for the transaction;

(3) *Count VI*—knowledge of forged documents sent in an official report to the bank with intent to commit a fraud;

(4) *Count VIII*—making false statements in an official report of the bank with intent to commit a fraud by denying receipt of a gift of stock by a bank customer or by denying receipt of a gift made solely because of his position at the bank; and

(5) *Count IX*—conspiracy to do the above mentioned acts.

The defendant moved for judgment of acquittal on all counts. The district court granted the motion because (a) the Government had failed to prove that the defendant had endeavored to procure a loan from the bank to Karlee, (b) the Government had failed to prove willful misapplication of the bank's funds, (c) the Government had failed to prove any misstatement to the bank by defendant, and (d) the Government failed to prove that the defendant knowingly joined any conspiracy. The Government contends that the district court's rulings are erroneous, except as to count VI from which no appeal was taken, that they must be vacated, and that the jury's verdict be reinstated. We agree as to all counts except the willful misapplication charge contained in count III.

The defendant asserts that we are foreclosed from reviewing the district court's judgment of acquittal for two reasons: (1) that there is no statutory authority to take such an appeal and (2) that even if there were, the double jeopardy clause would prohibit the appeal in this case. We find neither argument persuasive and hold that we

have jurisdiction over this appeal under 18 U.S.C. §3731 (1976).[7]

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[7] Section 3731 provides that

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

The defendant points to certain language in Justice Stevens' concurring opinion in United States v. Martin Linen Supply Co., 430 U.S. 564 (1977), which supports the view that section 3731 prevents an appeal from a judgment of acquittal based on the merits of the case. 430 U.S. at 576 ("There is no statutory authority for a Government appeal from a judgment of acquittal in a criminal case."). However appealing such an argument might be, we are precluded from adopting it for the Supreme Court has held that "the legislative history [of section 3731] makes it clear that Congress intended to remove *all* statutory barriers to Government appeals and to allow appeals whenever the constitution would permit." United States v. Wilson, 420 U.S. 332, 337 (1975) (emphasis supplied). Following this line we have taken appeals from judgments of acquittal, *see* United States v. Cahalane, 560 F.2d 601, 603 n.2 (3d Cir. 1977); United States v. Davis, 560 F.2d 144, 146-47 (3d Cir.), *cert. denied,* 98 S.Ct. 133 (1977). Thus, it is the law of this circuit that we have statutory authority to hear government appeals from judgments of acquittal. Unless the double jeopardy clause prevents this appeal, we have jurisdiction.

The Supreme Court has held that double jeopardy is not implicated in an appeal from a judgment of acquittal entered after a jury verdict of guilty because there is no possibility that the defendant will have to stand trial again

II. COUNT I

Count I of the indictment charges that defendant, while employed as an officer of the Central Penn National Bank, a federally insured bank

> did knowingly and unlawfully stipulate for, agree to receive and received a fee, commission, gift and thing of value, to wit: shares of stock in Greenmeadow Holding Company, a company which owned all of the stock of Karlee Corporation, for endeavoring to procure and procuring for Karlee Corporation and the stockholders of Greenmeadow Holding Company, through the warehousing account of Delaware Valley Mortgage and Realty Corporation at Central Penn National Bank, a loan and extension of credit in the approximate amount of $1,495,400. . . .
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> In violation of Title 18 United States Code §215.

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for the same offense. United States v. Wilson, *supra; see* United States v. Jenkins, 420 U.S. 358 (1975). The defendant attempts to distinguish *Wilson* as involving merely a judgment of acquittal based on a technical imperfection in the prosecution. In this case it is asserted that the judgment was based on a substantive finding of insufficiency of evidence. We find this a distinction without meaning, for even though the trial court may have had a substantive base for its decision, the critical fact is that defendant will not twice be tried and thus will not twice be put in jeopardy for the same offense. If the Government prevails in this appeal, the jury's guilty verdict will be reinstated. Therefore, no double jeopardy problem is presented and we have jurisdiction over the appeal. *See* United States v. Cahalane, *supra;* United States v. Davis, *supra.*

To make out a violation of section 215,[8] the Government need only prove: (1) that the accused was an officer or employee of a bank, the deposits of which are insured by the Federal Deposit Insurance Corporation; (2) who agreed to receive or received something of value from another; (3) for endeavoring to procure or procuring for that other or anyone else; (4) a loan from the bank in which the accused was employed.

It is undisputed that at all pertinent times the defendant was an officer of Central Penn, the deposits of which were insured by the Federal Deposit Insurance Corporation.[9] The proof is equally certain that the defendant received a thing of value—capital stock in Greenmeadow Holding Company.[10] The difficult question we face, however, is whether the evidence is sufficient to

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[8] 18 U.S.C. §215 (1976) provides in pertinent part:

> Whoever, being an officer [or] employee . . . of any bank, the deposits of which are insured by the Federal Deposit Insurance Corporation . . . except as provided by law, stipulates for or receives or consents or agrees to receive any fee, commission, gift, or thing of value, from any person, firm, or corporation, for procuring or endeavoring to procure for such person, firm, or corporation, or for any other person, firm, or corporation, from any such bank . . . any loan . . . shall be fined not more than $5,000 or imprisoned not more than one year or both.

[9] The parties stipulated as to this fact on all counts.

[10] Stock certificates in Greenmeadow listed in defendant's name, evidencing ownership of 20 percent of the company, were admitted at trial along with testimony by the officers of Greenmeadow that defendant was given his shares by the others.

prove either that the defendant procured or endeavored to procure a loan or that any loan in fact was made.

We conclude that the evidence, taken in the light most favorable to the Government, establishes that the defendant endeavored to procure a loan from the bank to Delaware Valley for the use of Greenmeadow/Karlee. We note that such proof is sufficient to make out a violation of section 215 even though the loan was procured for a company other than that which gave the fee or commission to the defendant. The district court found this evidence insufficient proof of the crime alleged in the indictment because it failed to prove either that the defendant endeavored to procure a loan from the bank or that the bank made such a loan to Greenmeadow/Karlee through the Delaware Valley warehousing line. We conclude that the evidence in the instant case is sufficient to show that the defendant, a bank officer, endeavored to procure and did procure a loan from the bank in which he was employed, in return for a fee, thing of value, or gift, and that this proof establishes an offense under section 215, even though the proceeds of the loan were delivered to a party other than the one which gave the fee. Any variation in proof of who received the loan is immaterial and harmless inasmuch as the indictment gave the defendant full and adequate notice of the charges against him. We therefore vacate the judgment of acquittal on count I.

(A) Sufficiency of Proof of a Loan

The threshold question we must address is whether the proof at trial established a loan by Central Penn to either Delaware Valley or Greenmeadow/Karlee, for the

failure to establish such an extension of credit would require judgment of acquittal even if there were no variation in proof at trial from the indictment. Proof that a bank made a loan to someone because of the actions of a bank officer is by itself insufficient to make out a violation of section 215; the loan must be found emanating *from the bank in which the defendant is employed.* Thus, in *United States v. Gerken,* 182 F. Supp. 738 (E.D.N.Y. 1960), the court dismissed a section 215 charge against the defendant bank employee for his action in securing a loan for a company from a bank other than the one for which he worked.

Defendant characterizes the loan in this case as identical to that of Gerken and maintains that the indictment should have been dismissed. His contention is that the only loan made in this case was the construction loan from Delaware Valley to Greenmeadow/Karlee and that none of his actions in regard to such a loan could be a violation of the statute.

The Government submits, however, that Central Penn in fact made a loan to Greenmeadow/Karlee. This contention is based on the theory that Delaware Valley was a mere conduit by which to transfer the funds to the actual borrower—Greenmeadow. The Government maintains that courts must look behind the facade of a transaction to establish the actual relationship between the bank and the eventual recipient of its funds. Citing *United States v. Bristol,* 473 F.2d 439 (5th Cir. 1973), in which a bank examiner was found guilty of accepting a loan from a bank official in violation of 18 U.S.C. §213 (1976), the Government maintains that the loan to Del-

aware Valley must be viewed for what it truly is—a loan to Greenmeadow/Karlee.

In *Bristol,* the Government's proof that the examiner received payment through a non-banking corporation *controlled* by the bank official was found sufficient to make out a loan *from the bank* to the examiner. Therefore, the Government reasons by analogy that the loan to Delaware Valley, which by virtue of interlocking officers was substantially the same as Greenmeadow, would be sufficient to prove a loan from the bank to Greenmeadow. We see the transaction in the instant case as distinguishable from both that of *Gerken* and that of *Bristol.*

Unlike *Gerken,* in which the officer's bank was in no way involved in the transfer of funds to the beneficiary, Central Penn, the defendant's employer, made the loan to and provided the funds for Delaware Valley. The transfer of those funds was critical, for without that transfer no loan to Greenmeadow/Karlee could have been consummated. Unlike the company controlled by the bank official in *Bristol,* Delaware Valley is not a mere shell. It is a corporation wholly separate and distinct from Greenmeadow and the *ownership* of the companies is entirely independent. The officers of the two overlapped, but this alone is not enough to provide a basis for concluding that the corporations were identical and that a loan to Delaware Valley is the equivalent of a loan to Greenmeadow/Karlee.

An examination of the facts adduced at trial demonstrates that two independent relationships were created in the Greenmeadow/Karlee venture: first, Delaware Valley agreed to grant a loan to Karlee for the develop-

ment of the property, and second, Delaware Valley borrowed the funds for this loan from Central Penn through its warehousing line. Even though the Government did not introduce documentary proof of the operation of this line, the evidence is sufficient to establish that extensions of credit to Delaware Valley on the line were not mechanical and automatic. Although Delaware Valley had a line of credit with Central Penn up to $2,000,000 for its warehouse line, whenever Delaware Valley drew funds against the line of credit it was required by the bank to support the draw with adequate documentation of the bona fides of the underlying loan transaction of Delaware Valley, supported by a commitment letter from a permanent lender. The mortgage department, under the defendant's supervision, had responsibility to assess each request for payment transmitted on the line. That the credit line was established prior to the request for funds for the Greenmeadow/Karlee line is irrelevant, for Central Penn had the right to consider each request separately and evidently could reject any request for an advance if a Delaware Valley transaction was not backed with proper documentation. Affirmative action on each request constituted a loan. Finally, a substantial payment in at least one instance was made directly from the bank to a Greenmeadow/Karlee account at another bank. Therefore, it appears to us beyond a doubt that the evidence at trial was adequate to establish a loan from Central Penn to Delaware Valley for Greenmeadow/Karlee.

At one point the district court apparently held that the Government need not prove a direct loan to Greenmeadow/Karlee from Central Penn and that all it need demonstrate was that the bank had authority to disapprove

the loan by Delaware Valley or that the defendant's help was necessary to insure no interference by the bank in the transaction. *United States v. Schoenhut,* 432 F.Supp. 470, 477 (E.D. Pa. 1977). As we have shown, the evidence of the bank's control was sufficient to make out the proof required by the district court.[11] A closer review of the district court's opinion, however, demonstrates that the court did in fact hold that more was necessary and that the evidence would have to be sufficient to prove a direct loan from Central Penn to Greenmeadow/Karlee as required by the indictment. Because it was not, the court entered a judgment of acquittal.[12]

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[11] The district court asserted that the Government had the burden of proving either that the bank had review power over loans made by Delaware Valley or that the defendant's participation was *necessary* to insure the transfer of funds to Karlee. The court stated that the evidence was insufficient to prove any duty on the part of the bank to inspect the Greenmeadow/Karlee construction site, and that this failure of proof prevented establishment of a control relationship between the bank and the beneficiary of a Delaware Valley loan. United States v. Schoenhut, *supra,* 432 F. Supp. at 477. The court, however, failed to consider the mortgage department loan policy manual written by the defendant himself and the testimony of the various witnesses of the bank's control over the warehouse line. Given these additional facts, the evidence of the bank's control over the line becomes clear and the characteristics of a loan are established.

[12] The district court stated that there was no "proof that a loan was secured from Central Penn National Bank," and concluded that "the government . . . failed to introduce into evidence any testimony upon which a jury could make the determination that the loan referred in count I of the indictment came from Central Penn Na-

Assuming the proof to be insufficient to establish this direct loan to Greenmeadow/Karlee, the evidence did show a direct loan to Delaware Valley. The Government, however, failed to prove all of the allegations of the indictment precisely as stated. Such a variance may be fatal if it destroys the defendant's basic right to be tried only on the charges presented in the indictment. *Stirone v. United States*, 361 U.S. 212 (1960). However, not all variances are so strictly construed.

We have held that judgment of acquittal as a matter of law is warranted only in a case in which the variance is a "modification in the elements of the crime charged." *United States v. Somers*, 496 F.2d 723, 744 (3d Cir.), *cert. denied*, 419 U.S. 832 (1974), *see United States v. Crocker*, 568 F.2d 1049, 1059-60 (3d Cir. 1977). However, if "the variance does not alter the elements of the offense charged, we will focus upon whether or not there has been prejudice to the defendant." *United States v. Somers, supra*, 496 F.2d at 744. Unless substantial rights of the defendant are affected by the variance, he has suffered no harm. *See* F. R. Crim. P. 52 (a).

A variance does not prejudice a defendant's substantial rights (1) if the indictment sufficiently informs the defendant of the charges against him so that he may prepare his defense and not be misled or surprised at trial, and (2) if the variance is not such that it will present a danger that

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tional Bank." United States v. Schoenhut, *supra*, 432 F. Supp. at 482. Therefore, the court granted the judgment of acquittal and although the court had at one time stated that it would not require direct proof of a loan from the bank to Greenmeadow/Karlee, its holding apparently was based in part on such a conclusion.

the defendant may be prosecuted a second time for the same offense. *United States v. Somers, supra,* 496 F.2d at 746; *see United States v. Anton,* 547 F.2d 493, 496 (9th Cir. 1976); *United States v. Anderson,* 532 F.2d 1218 (9th Cir. 1976). All other variances must be considered harmless error. *See* F. R. Crim. P. 52 (a).

This is not a case in which the variance concerns a basic element in the charge against the defendant. Unlike *Stirone v. United States, supra,* and *United States v. Crocker, supra,* the indictment in this case gave full notice to the defendant of the charge against him. In *Stirone,* the defendant was indicted and convicted of interference with the interstate movement of sand for the mixture of concrete to a steel plant being built in Pennsylvania. The court allowed evidence of defendant's interference with shipment from the plant to points outside of Pennsylvania and charged the jury on this act. The Supreme Court held that such actions amended the indictment and reversed the conviction. Similarly, in *Crocker,* this court held that the district court had committed reversible error in allowing the Government in a perjury prosecution, to prove that the defendant's statements were untruthful "in an entirely different manner" than that specifically charged by the grand jury. 568 F.2d at 1060. However, unlike *Stirone* or *Crocker,* in this case, the indictment accurately charged *all* of the facts which were proven at trial, though proven in a slightly different manner than that alleged.

Here, the indictment alleged a loan from Central Penn to Karlee through the Delaware Valley warehousing line. The proof at trial was of a loan from Central Penn to Delaware Valley for the use and benefit of Greenmeadow/Karlee. Defendant was clearly apprised of the charges

against him and could not have been surprised by the actions at trial. *United States v. Evans,* 398 F.2d 159, 166 (3d Cir. 1968) (variance harmless because defendant did not show that the variance impaired his ability to defend himself or identify the nature of the charge). The indictment need not be read technically, but should be construed with an appreciation of the existing realities. *United States v. Anderson, supra,* 532 F.2d at 1222. When so read, the variation in the instant case is harmless. *See United States v. Anderson, supra,* (defendant indicted for transportation of stolen securities interstate; indictment charged him with transport of "stock" interstate; stock not within the definition of security and proof was that the stock certificates were counterfeit; court held variance harmless); *Heisler v. United States,* 394 F.2d 692 (9th Cir.), *cert. denied,* 393 U.S. 986 (1968) (defendant indicted for passing a counterfeit 20 dollar bill; proof that he passed a counterfeit 10 dollar bill; held harmless); *Hall v. United States,* 372 F.2d 603 (8th Cir.), *cert. denied,* 387 U.S. 923 (1967) (indictment charged interstate transfer of a fraudulent check from Missouri to Arkansas; evidence proved the opposite; held harmless); *Cortez v. United States,* 328 F.2d 51 (5th Cir.), *cert. denied,* 379 U.S. 848 (1964) (indictment referred to a check drawn by Moore Service, Inc.; proof of a check drawn by Moore-Cutler Transportation, Inc.; held harmless).

Because the essence of the offense under section 215 is endeavoring to procure a loan from a bank for a thing of value by an officer of the bank, when the proof establishes that a bank officer endeavored to procure such a loan, a variance from the indictment in proof of who in fact received the loan is immaterial, where as here the officer was

"informed of the nature of the charge against him so that he was enabled to present his defense, was not taken by surprise and is protected against another prosecution for the same offense." *Ferrari v. United States,* 169 F.2d 353, 354 (9th Cir. (1948); *see Berger v. United States,* 295 U.S. 78, 81 (1935). We therefore conclude that the variance in the instant case was harmless and that defendant's rights were substantially preserved.

(B) Sufficiency of Proof of Procurement

The district court held that the proof was insufficient to show that defendant had procured or endeavored to procure a loan from Central Penn. The judge stated that the Government did not prove that it was *necessary* to enlist the aid and support of the defendant to secure the loan, *United States v. Schoenhut, supra,* 432 F. Supp. at 477; that the Government did not prove that defendant knew of the forgeries in the papers of the Karlee stock purchase and that the officers of Delaware Valley were hiding their identities from Mullin and Lonergan, *id.* at 480; that the defendant's knowledge of the relationship of the Delaware Valley officers to Greenmeadow/Karlee did not constitute proof of procuring a loan, for the relationship was not illegal, *id.;* and that defendant's advice to Heimbecker and the others was not procurement, but was perfectly innocent in the absence of knowledge that they were concealing the true identity of the Greenmeadow principals from Delaware Valley, *id.* at 482.[13]

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[13] The court refused to consider the Heimbecker hearsay testimony that the defendant was given his stock because of his help in procuring the loan. United States v. Schoenhut, *supra,* 432 F. Supp. at 483. We hold later in this opinion that such testimony should have been con-

We conclude that the evidence is sufficient to prove the defendant's endeavor to procure a loan from Central Penn. The district court overemphasized the need for proof that defendant *knew* of the fraudulent schemes and forgeries committed by Heimbecker and the others. The defendant's knowledge of these acts is irrelevant in assessing his own action or inaction[*] in securing a loan from his bank. Nor is proof that his complicity was necessary to obtain the loan an essential element of the offense, for section 215 prohibits the mere *endeavoring* to procure a loan for a thing of value and does not require the ability to do so. The evidence conclusively demonstrates defendant's concealment of his interest in the venture and the true identities of the others. This inaction is a sufficient basis upon which to predicate a conclusion that defendant made a willful attempt to secure the loan to Delaware Valley.

In the light most favorable to the Government, the evidence reveals (1) that Central Penn's funds were transmitted to Greenmeadow/Karlee; (2) that Central Penn had the contractual power to exercise control not only over the Delaware Valley warehouse line, but over the inspections of the Greenmeadow sites as well, in accordance with the manual written by the defendant; (3) that the defendant was in charge of Central Penn's mortgage department and knew of the lack of capital in Greenmeadow/Karlee and knew the true identities of the officers; (4) that the

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sidered against the defendant, *see* part V, *infra*, but even without the testimony, the evidence is sufficient to show that defendant endeavored to procure the loan.

[*Note: On May 15, 1978 the Court amended this opinion by deleting the word "inaction" and substituting therefor the word "concealment".]

defendant accepted Greenmeadow stock and had a financial interest in the outcome of the loans made by Central Penn; (5) that the defendant gave advice to Pierce and Heimbecker about using the Delaware Valley line to secure funds for Greenmeadow/Karlee and actually visited the sites after receiving the stock; and (6) *that the defendant told no one at the bank of his interest* in the venture even though he knew bank funds were being expended. All of the evidence, defendant's action and inaction, and the reasonable inference to be drawn by the jury that Central Penn would have thought twice before allowing the transfer of funds to Delaware Valley had defendant informed the bank of his interest in the transaction and of the interlocking relationship between Greenmeadow and Delaware Valley are sufficient to show defendant's endeavor to procure the bank loan.

III. COUNT III

Count III of the indictment charges that the defendant, while employed as an officer of Central Penn National Bank

> did knowingly and wilfully misapply monies, funds and credits of said bank, in that [he] authorized, and caused to be granted, a construction loan . . . in the approximate amount of $1,495,400, through the warehousing account of Delaware Valley Mortgage and Realty Corporation at Central Penn National Bank to Karlee Corporation, a company in which [he] was a director and . . . a stockholder . . . said loan was authorized and supervised without [his] revealing to Central Penn National Bank his own interest in Karlee Corporation . . .; and in that [he] authorized, and

caused to be granted, the above loan, well knowing that certain documents supplied to Central Penn National Bank by Karlee Corporation . . . were forged. . . . In violation of Title 18, United States Code §656.

To sustain a conviction of willful misapplication of bank funds under section 656[14] the Government must prove (1) that the defendant was an officer (2) of a federally connected bank, (3) who willfully misapplied funds at the bank, and (4) that he made the misapplication with the intent to injure and defraud the bank. *United States v. Schmidt,* 471 F.2d 385 (3d Cir. 1972) (per curiam). Intent to injure or defraud a bank exists whenever the defendant acts knowingly and the result of his conduct would be to injure or defraud the bank, regardless of his motive. *Id.* at 386; *see United States v. Tokoph,* 514 F.2d 547, 603 (10th Cir. 1975). Such intent may be inferred from facts and circumstances shown at trial and is basically a fact question for the jury. *United States v. Tokoph, supra,* 514 F.2d at 603. Reckless disregard of the interests of the bank is equivalent to intent to injure or defraud. *United States v. Wilson,* 500 F.2d 715, 720 (5th Cir. 1974), *cert. denied,* 420 U.S. 977 (1975); *United States v. Stevison,* 471 F.2d 143, 145 (7th Cir. 1973).

The district court granted judgment of acquittal on this count (1) because the Government failed to establish

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[14] 18 U.S.C. §656 (1976) provides in pertinent part:

Whoever being an officer . . . or employee of . . . any Federal Reserve bank, member bank, national bank or insured bank, . . . embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank . . . shall be fined not more than $5,000 or imprisoned not more than five years or both. . . .

a loan from Central Penn to Greenmeadow/Karlee and (2) because the evidence failed to prove defendant's knowledge of any forgeries or fraudulent documents sent to the bank in connection with any loan. *United States v. Schoenhut, supra,* 432 F.Supp. at 483-84. Although we have found that a loan was in fact granted by the bank, for the second reason expressed by the district court and because of the failure of the Government to establish defendant's intent to injure or defraud the bank, we affirm the judgment of acquittal on this count.

We have held that the defendant endeavored to procure a loan from Central Penn to Delaware Valley for the use and benefit of Greenmeadow/Karlee. This activity may have constituted a crime under section 215, but it does not without more amount to a willful misapplication of funds under section 656. Section 656 penalizes willful misapplication, but that term must be placed in context with the other acts prohibited by the section. It proscribes actions of one who "embezzles, abstracts," and "purloins." When this is read together with willful misapplication, it is evident that the *mens rea* for the crime is not fulfilled by mere indiscretion or even foolhardiness on the part of the bank officer. His conduct must amount to reckless disregard of the bank's interest or outright abstraction of funds. An examination of the cases under this section shows that defendant's actions do not rise to that level.

Prosecutions of bank officers for their actions in securing loans listed for one party but intended for another have fallen into three general categories: (1) cases in which the bank officer knew that the named debtor was fictitious or that the debtor was unaware of the use of his name for the debt; (2) cases in which the bank officer knew that the named debtor was financially unable to pay

back the loan; and (3) cases in which the bank officer assured the named debtor that it would not be obligated to repay the loan in the event of a default and that the bank would look solely to the intended beneficiary of the loan for repayment. *United States v. Gens,* 493 F.2d 216, 221-22 (1st Cir. 1974); *see United States v. Tokoph, supra,* (defendant arranged $90,000 loan for a company; arranged for bank to deliver $100,000 instead, $10,000 split as a kickback for arranging the transaction); *United States v. Schmidt, supra,* (defendant arranged loans for an individual through various third parties after the individual had exceeded his credit limit); *United States v. Stevison, supra,* (defendant cashed checks on accounts known by her to have insufficient funds, also cashed checks on phony accounts); *Williamson v. United States,* 332 F.2d 123 (5th Cir. 1964) (defendant advanced credit to an automobile dealer on loans he knew to be spurious). These cases all involve distinct actions by the officer to fraudulently obtain funds for others in violation of the bank's policies. This case involves nothing more than inaction by the defendant in allowing the transfer of funds to Delaware Valley when his action might have prevented the loan. That he had a financial interest in the beneficiary of the loan does not amount to an intent to injure or defraud under section 656. Rather, this case is similar to *United States v. Gens, supra,* in which the defendant loaned money taking no security on eight separate occasions, knowing that the proceeds would be turned over to another person. The court held that the evidence was insufficient to prove willful misapplication. *Cf. United States v. Gallagher,* Nos. 76-2665, 77-1034, 77-1278 (3d Cir. 1978) (section 656 conviction reversed because of erroneous charge; indication that defendant bank officer must have guilty knowledge of fraud on the bank).

It is true that defendant failed to make his dealings with Greenmeadow/Karlee known to the bank, but in the absence of proof that he knew of the false and fraudulent practices being committed by the officers of Delaware Valley, the evidence is insufficient to prove beyond a reasonable doubt defendant's intent to injure or defraud. *United States v. Wilson, supra.*

IV. COUNT VIII

Count VIII of the indictment states that defendant, while an officer of Central Penn National Bank

> did knowingly and unlawfully, with intent to defraud the bank, make a false report, statement and entry into the books of said bank [by supplying] false information to said bank in a questionnaire supplied him by said bank: to wit: [he] stated that he had no interest, financial or otherwise, in any company which borrowed money or was a customer of said bank, well knowing this statement to be untrue; [he] further stated that he had not received any commissions, fees, etc. from any source other than said bank in any transaction to which said bank was a party . . ., well knowing this statement to be untrue; [he] further stated that he had not acquired any stock or securities which were available to him only by reason of his employment with said bank . . ., well knowing this statement to be untrue. In violation of Title 18, United States Code, §1005.

The critical element of this offense is proof that the defendant knowingly made a false statement in an official

report of the bank with intent to defraud the bank or deceive any of its officers.[15] The Government entered the following document, a conflict of interest questionnaire sent by the bank to the defendant and other bank employees, into evidence. To each of the questions of the questionnaire the defendant answered in the negative.

> 1. Do you, or anyone in your immediate family, have any interest, financial or otherwise, in any company or organization which borrows from or is a customer of the Company? . . .
>
> 5. During the past year, have you received any gifts, discounts or other benefits, including loans, from anyone who borrows from or is a customer of the Company? . . .
>
> 6. During the past year, have you acquired any stock or property which were available to you only by reason of your employment with the Company? . . .

The district court, based on its assessment of the loan transaction to Greenmeadow/Karlee, the company in

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[15] 18 U.S.C. §1005 (1976) provides in pertinent part:

> Whoever makes any false entry in any book, report, or statement of such bank with intent to injure or defraud such bank, . . . or to deceive any officer of such bank . . . Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Defendant was also indicted under this section in Count VI for allowing documents, known by him to be forged and fraudulent, to support the extension of credit to Delaware Valley. The district court found no evidence to support this and granted judgment of acquittal. United States v. Schoenhut, *supra*, 432 F. Supp. at 484-85. The Government does not appeal this judgment.

which the defendant had an interest, concluded that Greenmeadow was not a customer of the bank and that therefore defendant did not answer falsely any question on the survey. Judgment of acquittal was entered on this basis. *United States v. Schoenhut, supra,* 432 F.Supp. at 485-86.

This reasoning, however accurate, is only relevant to assessing defendant's answer to question one, asking if he had an interest in a customer of the bank. Defendant's answers to the other questions asked were not specifically analyzed by the court. In completing such an analysis, we hold that the evidence would support defendant's conviction for falsely answering question six.

The introduction to the questionnaire specifically cautioned bank employees that any "question as to [a] possible conflict of interest should be resolved in consultation with the staff member's supervising officer." No question exists that the defendant did not consult with anyone at the bank about his answers to the questions asked, which at the least presented a possibility of conflict to the defendant.

The proof is strong that defendant misled the bank in his response to question number six which asked whether he had received any stock by reason of his employment with the bank. That question seems tailormade to the facts of this case. The record showed that Heimbecker made a "gift" of the Greenmeadow stock to the defendant, ostensibly for the purpose of rewarding him for past services. Even if given for past services, the gift was still made because of the defendant's status as an employee of the bank. The jury, knowing Heimbecker was the chief executive officer of a customer of the bank and the driving force behind the Greenmeadow/Karlee transaction could reasonably have made the inference that the defendant *knew* that

the gift was given to him, if not for his actual procurement of the loan, then at least because of his crucial position at the bank.[16]

After considering the evidence as a whole and the inferences that reasonably can be drawn from it, we conclude that there was an adequate basis for the jury verdict and we therefore vacate the judgment of acquittal on this count.

V. COUNT IX

Count IX charges the defendant with conspiring with others to violate 18 U.S.C. §§215, 656, 1005 (1976), in

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[16] The hearsay testimony of Heimbecker was that the defendant was given his initial shares of stock in Greenmeadow because of his actions in helping obtain financing and that his share was equalized with the others as compensation for his role in the cover-up of the false commitment letters. We hold that this evidence was admissible, *see* part V, *infra*. Given this additional proof, the guilty verdict is adequately backed by sufficient evidence.

Additionally, the proof at trial established that defendant falsely answered question five which asked whether the defendant had received any benefits, including loans, from anyone who borrowed from or was a customer of the bank. Delaware Valley was a customer of the bank and Delaware Valley granted a construction loan to Greenmeadow/Karlee, a company in which defendant was a one-fifth owner. On the record adduced at trial, the jury would have been justified in finding that defendant falsely answered this question by denying receipt of a benefit or loan from a customer of the bank. However, because the indictment did not specifically mention defendant's answer to this question, we do not base our decision on his response and rely solely on his answer to question six.

contravention of 18 U.S.C. §371 (1976).[17] The indictment stated that the purpose of the plan was for the defendant to agree to procure a loan for Greenmeadow/Karlee, knowingly misapply bank funds, and make materially false reports to the bank.

The district court held that as it had granted judgment of acquittal on all of the other counts and as it had held that no substantial evidence existed to show that the defendant had joined the conspiracy formed by Pierce, Inverso, Nirenberg, and Heimbecker, it would grant judgment of acquittal. *United States v. Schoenhut, supra,* 432 F. Supp. at 486. Because we believe that the evidence, viewed in the light most favorable to the verdict, supports a finding that the defendant conspired at least to procure funding for Greenmeadow/Karlee, we vacate the judgment of acquittal.

"Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development and collocation of circumstance.'" *Glasser v. United States,* 315 U.S. 60, 80 (1942), *citing United States v. Manton,* 107 F.2d 834, 839 (2d Cir. 1938), *accord, United States v. Westover,* 511 F.2d 1154, 1156 (9th Cir.), *cert. denied,* 423 U.S. 839 (1975). Once the existence of a conspiracy is estab-

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[17] 18 U.S.C. §371 provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy each shall be fined not more than $10,000 or imprisoned not more than five years or both.
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lished, only slight evidence is required to connect any given defendant with it. *United States v. Kates,* 508 F. 2d 308, 310 (3d Cir. 1975). This means that after a jury has found a defendant guilty beyond a reasonable doubt in a conspiracy case, "an appellate tribunal may not substitute its inferences from the evidence for those drawn by the fact-finder" as long as there is some evidence to support the verdict. *United States v. Cooper,* No. 77-1208, slip. op. at 3 (3d Cir. November 29, 1977). When the threshold requirement of demonstrating a likelihood of an illicit association by any defendant with a conspiracy is fulfilled, hearsay declarations of any of the conspirators are admissible against the others. *United States v. Bey,* 437 F.2d 188, 190 (3d Cir. 1971). The district court held that aside from certain hearsay statements of Heimbecker, there was no independent evidence of defendant's joining a conspiracy. It further held that the hearsay would not be considered as part of the evidence against the defendant, and that he could not be found a co-conspirator. *United States v. Schoenhut, supra,* 432 F. Supp. at 481.

Our review of the record convinces us that there was sufficient evidence to support a finding that there was conspiracy in which defendant participated, even in the absence of admission of the hearsay. The admission of that testimony makes the verdict even more clear.

The record demonstrates conclusively that there was an on-going conspiracy involving Heimbecker, Pierce, Inverso, and Nirenberg. Defendant had substantial dealings with all of this group through his position at the bank. He was given an equal membership with the others in Greenmeadow, a company controlled by the conspirators. Ad-

ditionally, the record reveals that defendant's bank made funds available to the conspirators through the Delaware Valley line, that defendant had responsibility over the line, that defendant knew of the nature of the activities of the Greenmeadow principals, that defendant did not reveal the Greenmeadow-Delaware Valley relationship or his own personal stake in the venture to anyone at the bank, and that he gave financial advice to Heimbecker and Pierce about how they might obtain funds from Central Penn by putting the transaction on the warehousing line. Such acts, though some might be innocent in themselves, when viewed as a whole tie the defendant inextricably to the conspiracy.

In *Direct Sales Co. v. United States,* 319 U.S. 703 (1943), the Supreme Court indicated that a "stake in the venture" may itself be an element in the proof of a conspiracy. 319 U.S. at 713. Given the defendant's stake in the venture in the instant case and the other factors listed above, the jury would have been justified in drawing the inference from the circumstantial evidence that the defendant had joined the conspiracy. Certainly such evidence is sufficient to provide the "likelihood of an illicit association" which would permit consideration of the hearsay evidence of Heimbecker. *United States v. Bey, supra.*

When Heimbecker's hearsay statements that the defendant was given his stock because of his help in securing financing and because of his assistance in the cover-up are considered along with the other evidence, sufficient proof of defendant's participation in the conspiracy is shown. Taking the evidence in the light most favorable to the verdict, the finding of guilty must be reinstated.

VI. CONCLUSION

Taking the evidence in the light most favorable to the Government, we hold:

(1) Sufficient evidence exists to sustain the defendant's conviction on count I of the indictment for endeavoring to procure a loan from Central Penn to Delaware Valley for Greenmeadow/Karlee. Any variance in the proof at trial from the allegations of the indictment was harmless.

(2) Sufficient evidence exists to sustain the defendant's conviction for making false statements in an official report to the bank by virtue of his failure to acknowledge receipt of capital stock in Greenmeadow given to him by virtue of his employment at the bank.

(3) Sufficient evidence exists to sustain defendant's conviction for conspiracy to knowingly receive a thing of value for endeavoring to procure a loan from the bank.

(4) Insufficient evidence exists to sustain defendant's conviction for willful misapplication of bank funds.

The district court's judgment of acquittal on count III of the indictment will be affirmed. The district court's judgment of acquittal on counts I, VIII, and IX will be vacated with instructions to reinstate the jury's verdict of guilty on those counts.

To the Clerk:

Please file the foregoing opinion:

(s) Max Rosenn
Circuit Judge

APPENDIX "C"

OPINION OF THE DISTRICT COURT

[432 F.Supp. 470]

UNITED STATES of America

v.

William F. SCHOENHUT, Jr.

Crim. A. No. 76-472.

United States District Court, E. D. Pennsylvania.

May 10, 1977.

After defendant was found guilty by jury on indictment charging defendant with illegal receipt of fee by bank officer, misapplication of bank funds, two counts of making false reports to a bank, and conspiracy, defendant filed motion for judgment of acquittal, arrest of judgment, and a new trial. The District Court, Gorbey, J., held that: (1) evidence was insufficient to sustain conviction of illegal receipt of a fee by a bank officer; (2) evidence was insufficient to sustain conviction of misapplication of bank funds; (3) evidence was insufficient to sustain conviction of making false reports to a bank, and (4) evidence was insufficient to sustain conviction of conspiracy.

Motion for judgment of acquittal granted.

1. Banks and Banking

In prosecution for illegal receipt of a fee by a bank officer, it is not necessary to prove that loan for which bank

officer received consideration was procured directly from the bank. 18 U.S.C.A. §215.

2. Banks and Banking

In prosecution for illegal receipt of a fee by a bank officer, evidence was insufficient to sustain convictions, despite evidence indicating that defendant, a bank officer, together with certain officers and employees of mortgage broker firm, had purchased corporation which owned land and then, through such corporate owner, had borrowed funds to develop land from mortgage broker firm which, in turn, had obtained the funds through line of credit agreement with bank, in view of lack of evidence that loan which defendant had allegedly procured came from the bank. 18 U.S.C.A. §215.

3. Criminal Law

In deciding a motion for judgment of acquittal, it is not for the court to weigh the evidence or to determine the credibility of the witnesses; verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the government, to support it.

4. Criminal Law

Test on a motion for judgment of acquittal is whether the evidence is such that reasonable minds could find guilt beyond a reasonable doubt.

5. Banks and Banking

Even though bank officer knew that certain officers of mortgage broker firm had, along with bank officer, purchased corporation which owned land and then, through such corporate owner, had borrowed funds to develop land

from mortgage broker firm which obtained funds through line of credit agreement with bank, relationship between mortgage broker firm officers and other corporations was not illegal per se where bank officer did not know that certain officers and employees of the mortgage broker firm planned to conceal true identity of principals of corporation which held corporate owner of the land so as to acquire loan from mortgage broker firm. 18 U.S.C.A. §215.

6. Conspiracy

Once the existence of a conspiracy is established, only slight evidence is required to connect any given defendant with it; however, slight evidence must be of the quality which will reasonably support a conclusion that the particular defendant in question willfully participated in the unlawful plan with the intent to further some object or purpose of the conspiracy.

7. Conspiracy

In a prosecution for conspiracy, a common purpose and plan need not be proved by direct evidence but may be inferred from a development and collocation of circumstances.

8. Criminal Law

In a prosecution for conspiracy, once the existence of the conspiracy and the defendant's participation therein is shown by independent evidence, statements of co-conspirators, even though hearsay in nature, are admissible.

9. Conspiracy

Before one can be held to have joined a conspiracy he must knowingly contribute his efforts in furtherance of it.

10. Conspiracy

One who furnishes supplies to an illicit conspiracy is not guilty of conspiracy even though his sale may have furthered the object of the conspiracy to which the buyer was a party but of which the supplier had no knowledge.

11. Criminal Law

In prosecution for illegal receipt of a fee by a bank officer and conspiracy, despite evidence that defendant, a bank officer, did certain things which furthered the interests of the conspiracy, in view of absence of evidence showing that bank officer joined illegal conspiracy, hearsay declarations of conspirator concerning bank officer's involvement in conspiracy could not be considered by the jury. 18 U.S.C.A. §215.

12. Banks and Banking

Where bank officer, together with officers and employees of mortgage broker firm, purchased corporation which owned land and then, through such corporate owner, borrowed funds to develop the land from mortgage broker firm which obtained funds through line of credit agreement with bank and where bank officer did not know that mortgage broker firm officers and employees planned to conceal true identity of principals of corporation which had purchased corporate owner of land so as to acquire loan from mortgage broker firm, bank officer could not be held criminally liable for advising mortgage broker firm officers and employees concerning financing and construction. 18 U.S.C.A. §215.

13. Banks and Banking

To sustain a conviction of willful misapplication of bank funds it must be proved that the defendant was an

officer of a federally connected bank, that he willfully misapplied funds at a bank, and that he made the misapplication with the intent to injure and defraud the bank. 18 U.S.C.A. §656.

14. Banks and Banking

In prosecution for willful misapplication of bank funds, evidence was insufficient to sustain conviction, in view of lack of evidence that loan in question emanated from bank at which defendant was an officer. 18 U.S.C.A. §656.

15. Banks and Banking

In prosecution for making false reports to a bank, evidence was insufficient to sustain conviction. 18 U.S.C.A. §1005.

16. Conspiracy

In prosecution for illegal receipt of a fee by a bank officer, misapplication of bank funds, two counts of making false reports to a bank, and conspiracy, evidence was insufficient to sustain conviction of conspiracy, in view of lack of substantial evidence indicating that defendant, a bank officer, joined the illegal conspiracy allegedly formed by officers and employees of mortgage broker firm which had line of credit agreement with bank. 18 U.S.C.A. §§215, 656, 1005.

David W. Marston, U.S. Atty., Peter J. Smith, Asst. U.S. Atty., Philadelphia, Pa., for plaintiff.

Morris Paul Baran, Philadelphia, Pa., for defendant.

Opinion of District Court

MEMORANDUM

GORBEY, District Judge.

This matter is presently before the court on defendant's motion for judgment of acquittal, arrest of judgment, and a new trial. The defendant was found guilty by a jury on January 12, 1977, on five counts of the above-captioned indictment, which charged him with illegal receipt of a fee by a bank officer, missapplication of bank funds, two counts of making false reports to a bank, and conspiracy. As this was a rather complex trial, a statement of the facts is necessitated.

I. FACTS

From sometime in 1972 through August, 1973, defendant, William Schoenhut, was an Assistant Vice President in the Mortgage Department of Central Penn National Bank ("Central Penn") in Philadelphia. From November of 1968 to September of 1973, John Jacobsen was the Vice President of the Mortgage Department at Central Penn and was defendant's immediate supervisor. When Mr. Jacobsen resigned from Central Penn in August of 1973, defendant succeeded him as the Vice President of the Mortgage Department. From at least mid-1972 through the fall of 1974, H. Gerard Heimbecker, David Pierce, Ronald Nirenberg and Philip Inverso were employees and/or officers of the Delaware Valley Mortgage and Realty Corporation ("Delaware Valley") which had its principal office in Philadelphia, with at least one branch office in Wilmington, Delaware.

Delaware Valley is a mortgage broker. Its business consists of buying, selling, and servicing mortgages, and to a lesser extent, providing financing for construction proj-

ects. What Delaware Valley does primarily is purchase mortgages through various realtors at a certain rate of interest. Delaware Valley then attempts to resell the mortgages to permanent lenders such as savings and loan associations or banks at lower rates of interest. During the interim period while it holds the mortgages, Delaware Valley needs extensive amounts of capital.

In early 1972, Heimbecker and Inverso, acting on behalf of Delaware Valley, approached Jacobsen and requested that Central Penn grant Delaware Valley a line of credit in the amount of $500,000. This loan was to be in the form of a "mortgage warehouse line". This was granted and was subsequently increased three times to two million dollars. Jacobsen was unable to remember while testifying at trial the exact terms of this extension of credit. No written agreement between Central Penn and Delaware Valley was ever introduced at trial. Whether or not such a written agreement even exists was unknown to the jury and to me. However, many of the witnesses at the trial testified concerning the nature of this "warehouse line". Ronald Nirenberg, who was Assistant Vice President at Delaware Valley from April, 1972 to August, 1974, described a warehousing account as follows:

> "A Basically it's like a line of credit. We would get applications for a particular mortgage, the buyer's application from the real estate broker and process it, getting a credit report, commitment and so forth on it, and when we were notified by the real estate broker they were ready to go to settlement, and we had our proper documentation together, we would prepare mortgage papers and we would go to settlement with the title company, and we would draw out

a check from a warehousing line payable to such title company or an attorney that represents the title company and they would make disbursement. What we would do then is send a collateral note down to our warehousing bank, Central Penn, to cover that particular settlement check out. And we had a certain line of credit up to a certain amount of money that we could go with our line." (N.T. 2.38, 2.39)

Mr. Jacobsen described mortgage warehousing as:

"A It is a style of an extension of credit whereby a mortgage banker, an originator of the mortgage loans would pledge those mortgages as collateral for an extension of credit. The purpose being to hold those loans in a pool until they could be delivered to an eventual purchaser of the mortgages." (N.T. 3-70)

Mr. Inverso, who was Vice President of Delaware Valley for approximately two and one half years from 1972 to August of 1974, testified that a warehousing or credit line is:

"A A warehousing line, basically it would relate to something similar to a ready money account and an individual would apply to a bank and establish a line of credit of say $1,000 and the bank would supply the individual with checks, and at the individual's convenience, they would use those checks to apply toward the credit that would work the same as a warehouse line, except in Delaware Valley's account, it was relating to mortgages as we used it and it was a credit line in effect." (N.T. 3-14)

Sometime in the spring of 1973, David Pierce, who was Manager of the Delaware branch office of Delaware

Valley, advised Heimbecker, Inverso and Nirenberg that there was a parcel of land in Smyrna, Delaware, owned by Karlee Corporation, which he felt might be very suitable for development by Delaware Valley. Delaware Valley had previously purchased raw land such as this with the intention of financing builders who would develop the land. (N.T. 1-66). Heimbecker, Inverso and Nirenberg were all officers at Delaware Valley at this time. They decided, along with Pierce, that it might prove very profitable for them to attempt to develop this land on their own. That is, rather than have Delaware Valley purchase the land and develop it or finance builders who would develop it to produce a profit for Delaware Valley, they were going to purchase it themselves and develop it themselves as a side venture. As their plan unfolded they were going to build sixty-seven homes on part of this parcel of land which was known as the "Karlee Tract". It was also their initial intention to attempt to secure financing for this project from Central Penn. They would need financing both to purchase the land and to construct the homes.

Sometime in the spring of 1973, Schoenhut inspected the site and submitted his recommendations and criticisms of the project to Heimbecker. The defendant also met with Pierce and Heimbecker during this period to discuss, among other things, the cost of the project and what periodic draw downs would be needed.

Central Penn never did directly loan the money needed for the project to those involved. Apparently, the reason for this was that Schoenhut turned down the request propounded by Heimbecker because the property in Delaware was too far away from Philadelphia for Central Penn to get involved. The exact reason was not testified to by

anyone except Schoenhut. Financing was subsequently obtained from Delaware Valley, using the money on its warehouse line.

In the spring of 1973, the Greenmeadow Holding Company was formed for the purpose of taking title to the stock of the Karlee Corporation. The shareholders of Greenmeadow Holding Company were Heimbecker, Nirenberg, Pierce, Inverso and Schoenhut. The percentage of the shares which was initially allotted to Mr. Schoenhut in relation to the other four men was one of the facts in dispute at the trial. Eventually, at least, he did obtain an equal percentage as was evidenced by the stock certificates themselves which were introduced as government Exhibit 4. Each of the five certificates was dated July 26, 1973, was ostensibly signed by H. Gerard Heimbecker as Secretary of the corporation, and gave each of the five shareholders 22.5 shares.

On the morning of July 19, 1973, a settlement was held in Philadelphia wherein Greenmeadow Holding Company purchased the stock of Karlee Corporation. On that afternoon, Delaware Valley granted a construction loan to the Karlee Corporation in the amount of $1,495,400. All of the documents evidencing this indebtedness to Delaware Valley, including the construction loan agreement, the corporation bond and the mortgage, were signed by Pasquale LiTrenta and Anne Laut on behalf of Karlee. LiTrenta and Laut, however, did not sign their own names. Instead they signed names supplied to them by Nirenberg and Inverso. As Mr. Pierce testified, the reason that none of the shareholders of Greenmeadow signed as officers of Karlee or Greenmeadow was that they did not want the owners of Delaware Valley to realize that some of their officers and

employees were involved in the loan from Delaware Valley to Karlee (N.T. 88). Delaware Valley then forwarded copies of these documents and a demand collateral note to Central Penn as part of its security for the warehouse line of credit. These fraudulent papers being sent to Central Penn formed the basis of Count VI of the indictment wherein Mr. Schoenhut is charged with "... knowingly and wilfully, and with intent to defraud said bank, made and caused to be made a materially false report, statement and entry into the books of said bank, ..." All of the witnesses who testified at trial concerning the signing of these documents by LiTrenta and Laut testified that Mr. Schoenhut was not present when these people came to the settlement and signed the documents. They further testified that these people were brought to the settlement by Nirenberg and Inverso.

Subsequent to July, 1973, the owners of Delaware Valley discovered that Nirenberg and Inverso and to a much lesser extent, Heimbecker, had collectively and in some cases individually perpetrated schemes whereby they embezzled in excess of a million dollars from Delaware Valley. One of these schemes involved drawing funds down on the Karlee project to pay for work which was never done. Nirenberg or Inverso would certify that certain work such as water and sewer lines had been done, would certify that they had inspected the work, or had it inspected, and would authorize payment for this work. However, such payments were not sent to the Karlee account known to all the shareholders of Karlee. These payments were sent to a separate account set up by Nirenberg and Inverso. It was not disputed that Schoenhut was completely unaware and completely uninvolved in these em-

bezzlements. What Schoenhut is accussed of by the government, although not specifically indicted for, is a failure to inspect the Karlee project prior to payments being made by Delaware Valley to Karlee. Had he inspected, the government suggests, certain funds would not have been able to have been diverted by Nirenberg and Inverso. One of the major issues at trial was what responsibility, if any, did Schoenhut, in his capacity as an officer of Central Penn, have to inspect the Karlee project prior to payments being made for completed work.

In November of 1973, Schoenhut, as a condition of his employment, completed a "conflict of interest questionnaire" for Central Penn. This questionnaire was introduced into evidence as government Exhibit number 26. In this questionnaire, among other things, he stated that he did not have any interest, financial or otherwise, in any company or organization which borrows from or is a customer of Central Penn; he stated that in the past year he did not receive any gifts, discounts, or other benefits, including loans, from anyone who borrows from or is a customer of the company; and he stated that in the past year he has not acquired any stocks, securities or property which were available to him by reason of his employment with Central Penn. It is charged by the government that Schoenhut's receipt of the Greenmeadow stock proves that Schoenhut supplied false answers to this questionnaire. Inverso, Nirenberg and Pierce testified at trial that Mr. Heimbecker told them that Schoenhut was initially to receive ten percent of the stock for his efforts in procuring the loan from Central Penn, and that his interest was increased to twenty percent when he interceded on their behalf to help cover up certain of the aforementioned embezzlements. Mr.

Schoenhut testified that Heimbecker gave him twenty percent of the stock at one time, and that he gave it to him gratuitously, possibly because of the many favors Schoenhut had done for Heimbecker in the past. Heimbecker was not called as a witness by either the government or the defense.

It was stipulated at trial that at all times pertinent to the indictment, Central Penn National Bank was insured by the Federal Deposit Insurance Corporation (Government Exhibit No. 1). It was further conceded that at all times relevant to the indictment, Schoenhut was an officer of Central Penn National Bank.

II. ARGUMENTS

For the sake of clarity, I will attempt to discuss each count of the indictment separately. However, at times the arguments for the various counts overlap, in particular with reference to Count IX which is the conspiracy count.

COUNT I

Defendant is charged in Count I as follows:

> "On or about July 19, 1973 at Philadelphia, in the Eastern District of Pennsylvania, William F. Schoenhut, Jr., then being an Assistant Vice President at Central Penn National Bank, a bank the deposits of which are insured by the Federal Deposit Insurance Corporation, did knowingly and unlawfully stipulate for, agree to receive and received a fee, commission, gift and thing of value, to wit: shares of stock in Greenmeadow Holding Company, a company which owned all of the stock of Karlee Corporation, for endeavoring to procure and procuring for Karlee Cor-

poration and the stockholders of Greenmeadow Holding Company, through the warehousing account of Delaware Valley Mortgage and Realty Corporation at Central Penn National Bank, a loan and an extension of credit, in the approximate amount of $1,495,400; and said William F. Schoenhut, Jr. was not legally entitled to receive the above fee, commission and thing of value.

In violation of Title 18, United States Code, §215."

The defendant argues that the language of this Count of the indictment does not charge a crime within the meaning of the subject statute, and alternatively, the record of this case does not support a conviction under this Count of the indictment. 18 U.S.C. §215 provides as follows:

"§215. *Receipt of commissions or gifts for procuring loans*

Whoever, being an officer, director, employee, agent, or attorney of any bank, the deposits of which are insured by the Federal Deposit Insurance Corporation of a Federal intermediate credit bank, or of a National Argicultural Credit Corporation, except as provided by law, stipulates for or receives or consents or agrees to receive any fee, commission, gift, or thing of value, from any person, firm, or corporation, for procuring or endeavoring to procure for such person, firm, or corporation, or for any other person, firm, or corporation, from any such bank or corporation, any loan or extension or renewal of loan or substitution of security, or the purchase or discount or acceptance of any paper, note, draft, check, or bill of exchange by

any such bank or corporation, shall be fined not more than $5,000 or imprisoned not more than one year or both."

To be guilty of Count I, it must first be proven that defendant was an officer of a bank which was insured by the Federal Deposit Insurance Corporation at the time of the alleged incidents. These facts were agreed to by the defendant. The government must further have proved that the defendant procured or endeavored to procure a loan for Karlee from the Central Penn National Bank. The defendant argues that since the construction loan agreement was between Delaware Valley and Karlee, he cannot be guilty of this offense as he was an officer of Central Penn, but not an officer of Delaware Valley, and Delaware Valley is the entity which granted the loan, not Central Penn. The government submits that since Delaware Valley in turn was getting its money from Central Penn the statute is applicable. The defendant is not charged with endeavoring to procure a loan directly from Central Penn to Karlee, although one of the unindicted co-conspirators stated that he thought this was why Schoenhut was to be asked to join the alleged conspiracy (Inverso, N.T. 3.53, 3.54).

[1, 2] Schoenhut is charged with receiving a thing of value, shares of stock in Greenmeadow Holding Company, for endeavoring to procure and procuring for Karlee a $1,495,400 loan and extension of credit through the warehouse account of Delaware Valley. In support of his argument that the indictment does not state an offense under the statute, the defendant cites the case of *United States v. Gerken*, D.C.N.Y., 182 F.Supp. 738, wherein the United States District Court for the Eastern District of New York, in 1960 construed 18 U.S.C. §220 which was the

predecessor of 18 U.S.C. §215. In that case the defendant was a Vice President of the Security National Bank of Long Island. He was charged with receiving a fee for endeavoring to procure a loan from the Riverhead Savings Bank for a third party, the Huntington Station Realty Corporation. The Security National Bank of Long Island and the Riverhead savings bank were not related to each other in any manner. The funds used for the loan given by Riverhead Savings Bank did not come from Security National Bank of Long Island. In dismissing the indictment the court stated:

> "On December 31, 1949, of a total of 14,687 operating commercial and mutual savings banks in the United States, 13,628 were institutions whose deposits were insured. U.S. Code Cong. & Adm. News, p. 3766 (1950). The Government would have the court so construe section 220 that an attorney for one insured bank could not receive a fee for procuring a loan for a client by any one of the banking institutions throughout the United States so insured, no matter how remotely situated from his bank client, without becoming a criminal.
>
> The legislative history of 18 U.S.C. §220 plus the unreasonable and absurd consequences to which the interpretation urged by the Government would lead, satisfy the court that the indictment in the instant case does not allege a crime within the meaning of the statute." *Id.* at 742.

In arguing against the defendant's motion in arrest of judgment, the government cites *United States v. Bristol,* 473 F.2d 439, a 1973 Fifth Circuit decision. In that case the court was concerned with 18 U.S.C. §213 which provides that a bank examiner may not accept a loan from a bank

or any person connected therewith examined by him. The law involved in the *Bristol* case would be applicable in the instant case. In that case the defendant accepted a loan from a company which was controlled by the Chairman of the Board of the Sharpstown State Bank, which bank Bristol had recently examined. The money which the company paid came directly from the Chairman of the Board. In denying Bristol's appeal, the court stated:

> "Congress, in passing section 213 and its companion section 212 (which prohibits bank officers from making a section 213 loan), intended to proscribe certain financial transactions which could lead to a bank examiner carrying out his duties with less than total, unbiased objectivity. With the intent of Congress evident from the face of the statute, a construction which would allow a bank officer to circumvent that intent simply by channeling a loan through a controlled shell corporation is untenable. Thus, we hold that the facts alleged in the indictment concerning the mechanics of the loan, if proved would constitute a violation of 18 U.S.C.A. §213." *Id.* at p. 442.

In the instant matter the government argues that Delaware Valley was merely a conduit through which a loan was made from Central Penn to the Karlee Corporation. I do not believe that either of the above cases is controlling in this matter as the relationship between Delaware Valley and Central Penn is somewhere in between the two extremes cited above by the defendant and by the government. Indeed, I find it extremely difficult to make a determination as to whether or not the instant situation is one where the intermediary, Delaware Valley, is merely a conduit, or whether Delaware Valley in fact is the true lender

and Central Penn and its employees are sufficiently divorced from the matter so that I might grant defendant's motion in arrest of judgment. I cannot accept defendant's argument that to be guilty of an offense under §215 he must have procured or endeavored to procure a loan *directly* from Central Penn. If the loan from Delaware Valley to Karlee had to be approved by Central Penn and the defendant procured or endeavored to procure this approval, I would confirm his conviction under Count I. Even if the explicit approval of Central Penn were not needed and the defendant acted to insure that Central Penn would in no way interfere with the loan from Delaware Valley to Karlee, I would find that Count I stated an offense under §215. However, the problem arises, as I will explain below, that it was not shown in court, : otherwise, exactly what the relationship was between Central Penn and Delaware Valley. For this reason I will refrain from deciding defendant's motion in arrest of judgment and instead grant defendant's motion for judgment of acquittal as the evidence presented by the government is insufficient to sustain a conviction.

The agreement between Central Penn and Delaware Valley was either never reduced to writing or for some reason neither the government nor the defendant chose to introduce it into evidence. Therefore, I must rely on the testimony of the various witnesses to determine whether or not it was necessary for the Delaware Valley conspirators to enlist the aid and support of the defendant, William Schoenhut, in order to secure the loan from Delaware Valley. Aside from approval of the initial construction loan, the government contends that Schoenhut's complicity was necessary to insure that nobody from Central Penn

ever inspected the construction site prior to any funds being drawn down[1] from the loan to pay for the cost of construction. The reason for this may in part be due to a fear that such an inspection would lead to disclosure of the true principals of Karlee. In August, 1973, Karlee applied for payment of a $90,000 draw down thereby inferring that water and sewer lines were in fact completed as per the construction loan agreement. The officers of Delaware Valley were required to certify that they inspected the site and that this work was in fact done. Of course the officers of Delaware Valley who were required to make this certification and those who applied for the payment on behalf of Karlee were one and the same. As Mr. Nirenberg testified:

> "Q You stated on cross examination, I believe, that you yourself and Mr. Inverso and Mr. Heimbecker planned and carried out the transaction that involved the taking out of $90,450 from the Karlee account and the use of at least part of that money for some other purpose, is that correct?
>
> A Yes, sir.
>
> Q Were the three of you directors of Greenmeadow Holding Company?

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[1] A "draw down" is a term commonly used in connection with a construction loan. What it means is that whenever construction is completed to a certain stage, the builder applies to the lender for payment of a certain percentage of the loan. Before making these payments, however, a lender inspects the construction site to insure that the work is in fact done. Such inspections are specifically provided for by Delaware Valley in paragraphs 4 and 11 of the construction loan agreement (Government Exhibit No. 6).

A Yes, sir."
(N.T. 3-8)

In an attempt to establish what role Central Penn played in the loan between Delaware Valley and Karlee, I will start with an examination of the testimony of John Jacobsen who was the Vice President in charge of the Mortgage Department when the warehouse line was initially established in 1972 (N.T. 3-71). Mr. Jacobsen testified about Central Penn's policies concerning inspection and payments when Central Penn was the direct lender on a construction loan. He was also asked, as follows, about Central Penn's policy when its borrower granted a construction loan to a third party:

> "Q Did you have any special policy regarding warehouse lines where the borrower in turn loaned out money as construction loans?
>
> A I don't know that we had a specific written policy on that subject, but it was my feeling."
> (N.T. 3-77)

Mr. Jacobsen then testified extensively about specific inspection procedures when Central Penn was a direct lender. He also testified that Central Penn only gave out construction loans in Southern Pennsylvania and Southern New Jersey. He specifically stated:

> "I don't recall any projects being outside of that general geographic area." (N.T. 3-80)

Concerning Central Penn's responsibility to inspect when Delaware Valley makes the construction loan, Mr. Jacobsen testified on cross as follows:

"Q Now in a situation of that kind, it is Delaware Valley who would be considered the customer of the bank, is that correct, sir?

A Yes, Delaware Valley was the borrower of the warehousing line.

Q And all relationships as far as borrower and lender were only between Central Penn and Delaware Valley?

A Yes.

Q And as far as the procedures that you have testified to on direct examination, these procedures would normally apply when Central Penn was making a direct loan to somebody in the construction business, isn't that correct, sir?

A I think yes.

Q So, when you were talking about inspection procedures for construction drawdowns, that would normally only apply when Central Penn is a direct lender to the party constructing, is that correct, sir?

A If we are talking about a situation, sir, where Central Penn is lending to a borrower who is in fact the builder—developer, yes, that is true.

Q But normally, where they are dealing with a construction loan built into a warehousing loan, you leave that obligation to the primary lender, I mean, the borrower, isn't that correct?

A I think you would say you would leave it to the primary borrower but I don't feel you would completely ignore the activity within that construction loan and the purposes for which the funds are being used."

(N.T. 3-86, 3-87)

On re-cross Mr. Jacobsen further testified in this area:

> "Q Where the borrower is in the construction business himself, where the borrower is going to use these funds for construction purposes and where Central Penn has in fact loaned these monies to that borrower, construction site inspections would be more important, would they not?
>
> A They would be a prerequisite rather than just more important. It would be an absolute necessity to make an inspection before a drawdown or an advance was made.
>
> Q That is not always the case, is it, when the construction loan is part of the warehouse line and the borrower in turn lends the money to someone else?
>
> A I think it is a matter of internal operational preference and procedure and control as to how often you will make that inspection in that set of circumstances."
>
> (N.T. 3-94, 3-95)

On re-direct examination Mr. Jacobsen stated:

> "Q Would inspection still be made under the set of facts that was described to you in that last question by Mr. Baran?
>
> A Yes."
>
> (N.T. 3-96)

Although Mr. Jacobsen seems to indicate that some inspections would be made, he does not say when these inspections would be made, how often they would be made, by whom they would be made, or more importantly, whether or not it was the responsibility of Central Penn's officers to make sure they were made. The only thing he makes perfectly clear is that Delaware Valley is the one who is re-

sponsible for making these inspections. Certainly this testimony is insufficient to warrant a conviction of Mr. Schoenhut, especially considering the testimony that the site that was to be inspected in Southern Delaware was outside the range of Central Penn. In fact, I will take judicial notice that the reason lending institutions such as Central Penn do not grant construction mortgages beyond a certain distance is because it is too far for them to travel to make the necessary inspections in the ordinary course of the bank's business. Delaware Valley had a branch office in Delaware so the distance of the project from Philadelphia would be no impediment to Delaware Valley.

Mr. R. Laird Sommerville, Jr., who is the Executive Vice President in charge of the commercial loan portfolio at Central Penn and who was Mr. Jacobsen's immediate supervisor in 1973, also testified. Concerning the warehouse line, he testified on cross:

> "Q Okay. Now on the warehouse line, the Delaware Valley warehouse line with Central Penn, sir, the customer is Dalaware Valley, isn't that correct?
>
> A That is correct.
>
> Q And the individual mortgage or the various construction loan agreements that might be involved in the warehouse line are matters between the borrower, Delaware Valley and these people on the line, isn't that correct, sir?
>
> A That is correct.
>
> * * * * * *
>
> Q And the primary responsibility or the party that Central Penn would look to in the event of any

financial difficulty would be Delaware Valley, isn't that correct, sir?

A Correct."

(N.T. 3-115, 3-116)

Mr. Sommerville then further testified that if there were a default on the loan to Delaware Valley, they would thereafter look to Delaware Valley's parent corporation, Mullin and Lonergan, Associates, and to various mortgages and notes on the line.

[3-5] In deciding a motion for judgment of acquittal it is not for the court to weigh the evidence or to determine the credibility of the witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the government, to support it. *Glasser v. United States,* 315 U.S. 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942); *Hamling v. United States,* 418 U.S. 87, 124, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974). The test on a motion for judgment of acquittal is whether the evidence is such that reasonable minds could find guilt beyond a reasonable doubt. *United States v. Hopkins,* 354 F.Supp. 634, 636 (E.D.Pa. 1973). The government states in its memorandum contra defendant's motions for judgment of acquittal, arrest of judgment and new trial that:

> "The evidence set forth above is, at the very least, consistent with the conclusion that Defendant, through a series of actions, tried, attempted, set about, and attended to, the securing of funds from Central Penn, his employer. It is consistent, at the very least, with the conclusion that Defendant received shares of stock in return for his 'efforts' and subsequently was given additional shares for further efforts on behalf of Delaware Valley and his associates in Greenmeadows.

The explanation of Defendant's involvement urged on the jury and this Court by the defense, i.e., that he was a passive observer of the use of the warehouse line as a source for funds, ignores the evidence that (1) Central Penn's funds were those utilized to make the transaction possible; (2) that Central Penn had an interest in insuring certain preliminary requirements were met and that at least some supervisory controls were maintained over the flow of money; (3) that Defendant was the only person at Central Penn who knew of the relationship between the Delaware Valley officers and Karlee-Greenmeadow; (4) that funds flowed via wire transfers directly from Central Penn to a Karlee bank account and (5) that Defendant was the person at Central Penn with direct responsibility for overseeing the function of the warehouse line.

The thrust of the testimony of Jacobsen, Sommerville and Myers was that Defendant had a responsibility to insure that the warehouse line, since it was ultimately Central Penn's money, was not misused. Even accepting Defendant's testimony with regard to the extent of his involvement, it was clearly established that he (1) accepted the Greenmeadow stock; (2) met with Pierce and Heimbecker to work out the details of the financing and construction; (3) visited the site twice *after receiving the stock;* (4) advised Heimbecker on various aspects of the economics and financing of the venture; (5) told Heimbecker he saw no reason why the financing could not be put through the warehouse line in terms which expressly use the word 'approval'; and (6)

failed to advise anyone at Central Penn of his involvement in the venture and the relationship of Delaware Valley officers to Karlee-Greenmeadow." (Emphasis supplied) (Pp. 16-17)

Addressing the contention that defendant knew of the relationship between the Delaware Valley officers and Karlee-Greenmeadow, I must state that this relationship is not illegal per se. What taints the construction loan is the concealment from Delaware Valley of the true identities of the principals of Greenmeadow. As suggested earlier there is no evidence that defendant was present when LiTrenta and Laut assisted the Delaware Valley conspirators when they went to settlement and signed fictitious names. Inverso testified concerning the events on the day of settlement, July 19, 1973 as follows:

"Q. By the way, when these parties came in at the time of settlement to sign fictitious names to the agreement, Mr. Schoenhut wasn't there, was he?

A. No, sir.

Q. But there was an attorney there, wasn't he? Wasn't there an attorney?

A. Not present at the signatures, no, sir.

Q. But was he present at the settlement?

A. Yes, sir.

Q. Did you tell the attorney, by the way, these are people that are coming in to sign phoney names to the agreements?

A. No, sir."

(N.T. 3-51)

Nirenberg confirmed Inverso's statement that Schoenhut was not present when LiTrenta and Laut signed the fictitious names.

"Q. But there were fictitious signers on some of the agreements?

A. Yes, sir.

Q. And you testified that you brought one in and Mr. Inverso brought the other one in?

A. Yes, sir.

Q. Now, Mr. Schoenhut had nothing to do with that, did he?

A. No, sir."

(N.T. 2.86)

The evidence is clear that defendant was not present when false names were affixed to the agreement between Karlee and Delaware Valley. In fact the evidence is quite clear that this was done without Schoenhut's knowledge or acquiescence. Further, there is no credible evidence that Schoenhut was aware of the intention of his alleged co-conspirators to conceal anything from Delaware Valley.

Nirenberg, Pierce, and Inverso all testified that they entered into an illegal conspiracy with Heimbecker and that Heimbecker advised them that Schoenhut would be brought into the conspiracy. Pierce testified:

"Q. Now sir, you testified yesterday about certain understandings that you had with regard to Mr. Schoenhut receiving stock in Greenmeadow.

A. Correct.

Q. Were you present when conversations were allegedly had between Mr. Heimbecker and Mr. Schoenhut pertaining to the same?

A. No.

Q. And you only know what Mr. Heimbecker told you, isn't that correct?

A. Both Mr. Heimbecker and Mr. Nirenberg.

Q. But you only know what someone else told you?

A. All I know is what I saw in correspondence and what people told me, yes.

Q. You were not present when such an understanding was made?

A. No."

(N.T. 2.9, 2.10)

Nirenberg likewise testified:

"Q. Mr. Nirenberg, you testified as to certain arrangements with Mr. Schoenhut pertaining to acquisitions of stock in Greenmeadow, is that correct, sir?

A. Yes, sir.

Q. You didn't personally meet with Mr. Schoenhut, did you?

A. No, sir.

Q. As a matter of fact you of your own knowledge do not know what occurred, do you?

A. No, sir.

Q. You only know what you were told by Mr. Heimbecker?

A. Yes, sir.

Q. And your testimony concerning a later agreement as to the increase in percentage of stock wherein Mr. Schoenhut was to receive additional shares, you don't know that of your own knowledge, do you?

A. No, sir.

Q. You only know what Mr. Heimbecker told you?

A. Yes, sir."

(N.T. 2.85, 2.86)

Inverso also confirmed:

"Q. Mr. Inverso, on direct examination you testified to an agreement whereby Mr. Schoenhut was to receive stock in Greenmeadow Corporation, is that correct, sir?

A. That's correct, sir.

Q. You were not present at the time of such an agreement, if one in fact existed between Mr. Schoenhut and Mr. Heimbecker, were you?

A. No, sir.

Q. And you only know what you heard from Mr. Heimbecker?

A. That is correct."

(N.T. 3-48)

"Q. You also testified that there came a time when Mr. Schoenhut's interest, if any, would be increased, is that correct?

A. That's correct.

Q. You were not present when such an agreement took place, if in fact one did, were you?

A. Between the two parties, sir?

Q. Yes.

A. No, sir.

Q. You don't know of your personal knowledge if such an agreement did take place, do you?

A. Personal knowledge, no, sir.

Q. And you only know what Mr. Heimbecker told you, if in fact he told you anything, isn't that correct?

A. That's correct, sir."

(N.T. 3-49)

"Q. Now, you really don't know of your personal knowledge whether or not Heimbecker, if he told you anything about this was telling you the truth, do you?

A. No, sir."

(N.T. 3-54)

[6-11] Once the existence of a conspiracy is established only slight evidence is required to connect any given defendant with it. *United States v. Westover,* 511 F.2d 1154 (9th Cir. 1975). Of course, the slight evidence must be of the quality which will reasonably support a conclusion that the particular defendant in question willfully participated in the unlawful plan with the intent to further some object or purpose of the conspiracy. A common purpose and plan need not be proved by direct evidence but may be inferred from a development and collocation of circumstances. *Glasser v. United States, supra.* Once the existence of the conspiracy and the defendant's participation therein is shown by independent evidence, statements of co-conspirators, even though hearsay in nature, are admissible. *Blumenthal v. United States,* 332 U.S. 539, 68 S.Ct. 248, 92 L.Ed. 154 (1947). In this case, aside from the hearsay statements of Heimbecker, there is no evidence that shows that Schoenhut joined the illegal conspiracy. There is evidence that Schoenhut did certain things which furthered the interests of the conspiracy. Schoenhut met with Pierce and Heimbecker after

visiting the site to determine the amount of money needed to finance the project (N.T. 75). The government also introduced into evidence a letter from Schoenhut to Heimbecker which discussed the feasibility of the project (Government's Exhibit No. 8). And, of course, the fact that defendant accepted stock in Greenmeadow Holding Company is incontrovertible. However, before one can be held to have joined a conspiracy he must *knowingly* contribute his efforts in furtherance of it. *Nassif v. United States*, 370 F.2d 147, 152 (8th Cir. 1966). One who furnishes supplies to an illicit conspiracy is not guilty of conspiracy even though his sale may have furthered the object of a conspiracy to which the buyer was a party but of which the supplier had no knowledge. *United States v. Falcone*, 311 U.S. 205, 61 S.Ct. 204, 85 L.Ed. 128 (1940). All of the acts which the government contends place Schoenhut into the conspiracy were completely innocent acts which fail to show that Schoenhut willfully participated in any unlawful plan. Therefore, the jury should not have been permitted to consider the hearsay declarations of Heimbecker which I have referred to above, and for the purposes of the pending motions, I will not consider hearsay statements made by Mr. Heimbecker to be competent evidence.

[12] The facts that defendant met with Pierce and Heimbecker to work out the details of the financing and construction, that he visited the site twice after receiving the stock, that he advised Heimbecker on various aspects of the economics and financing of the venture and that he told Heimbecker he saw no reason why the financing could not be put through the warehouse lines are not in themselves criminal in nature. Unless Schoenhut knew

that the Delaware Valley conspirators planned to conceal the true identity of the principals of Greenmeadow from Delaware Valley, his assistance to them was perfectly innocent. The acts which the government claims proves defendant's involvement in a conspiracy are not illegal acts. Excepting all these facts there remains no evidence that the defendant did anything to attempt to procure a loan from Central Penn or to insure that Central Penn would in no way interfere with Karlee gaining a loan from Delaware Valley. Nor is there any proof that a loan was secured from Central Penn National Bank. Therefore, considering all the evidence in a light most favorable to the government, I have reached the inescapable conclusion that the government has failed to introduce into evidence any testimony upon which a jury could make the determination that the loan referred to in Count I of the indictment came from Central Penn National Bank. Since one of the essential elements of the offense charged in Count I is that the defendant procure or endeavor to procure a loan from Central Penn National Bank and since the government has not produced evidence to indicate that the loan came from Central Penn, I must grant defendant's motion for judgment of acquittal as to Count I of the indictment.

COUNT III

[13, 14] The defendant is charged in Count III as follows:

> "From on or about July 19, 1973 and continuing to on or about July 19, 1974, at Philadelphia, in the Eastern District of Pennsylvania, William F. Schoen-

hut, Jr., then being Assistant Vice President of Central Penn National Bank, a bank the deposits of which are insured by the Federal Deposit Insurance Corporation, did knowingly and wilfully misapply monies, funds and credits of said bank, in that said William F. Schoenhut, Jr. authorized, and caused to be granted, a construction loan, and in extension of credit, in the approximate amount of $1,495,400, through the warehousing account of Delaware Valley Mortgage and Realty Corporation at Central Penn National Bank, to Karlee Corporation, a company in which William F. Schoenhut, Jr. was a director and a company in which William F. Schoenhut, Jr. was a stockholder, in that all of the stock of Karlee Corporation was owned by Greenmeadow Holding Company, a company in which William F. Schoenhut, Jr. held approximately 20% of the outstanding stock, said loan was authorized and supervised by William F. Schoenhut, Jr. without his revealing to Central Penn National Bank his own interest in Karlee Corporation and Greenmeadow Holding Company; and in that, William F. Schoenhut, Jr., authorized, and caused to be granted, the above loan well knowing that certain documents supplied to Central Penn National Bank by Karlee Corporation, in connection with said loan, were forged and contained materially false statements and information. In violation of Title 18, United States Code, §656."

Title 18 U.S.C. §656 reads as follows:

"§656. Theft, embezzlement, or misapplication by bank officer or employee

> Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, or a receiver of a national bank, or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed $100 he shall be fined not more than $1,000 or imprisoned not more than one year, or both . . ."

To sustain a conviction of willful misapplication of bank funds under 18 U.S.C. §656, it must be proved that (1) the defendant was an officer of (2) a federally connected bank, (3) that he willfully misapplied funds at a bank, and (4) that he made the misapplication with the intent to injure and defraud the bank. *United States v. Schmidt,* 471 F.2d 385 (3d Cir. 1972). It is not disputed that the defendant was an officer of a federally connected bank. I have already determined above that there was not presented to the jury substantial evidence that the loan in question emanates from Central Penn National Bank. It follows therefrom that defendant could not be convicted of authorizing or causing to be granted a construction loan and an extension of credit through the

warehousing account of Delaware Valley Mortgage and Realty Corporation at Central Penn National Bank to Karlee Corporation.

Once again the government contends that there is sufficient evidence to convict the defendant of Count III, that evidence consisting of defendant's efforts to secure funds from Central Penn for an enterprise in which he had an interest (Page 19, Government's Memorandum Contra Motions for Judgment of Acquittal, Arrest of Judgment and New Trial). However, as already discussed there is no evidence that the funds came from Central Penn within the meaning of the statute. I reiterate that it is possible that there could be a similar situation in which an officer of the lending institution which grants the extension of credit to a mortgage and realty company, which in turn grants a construction loan to another corporation, where the original lending institution retained enough control over the eventual use of the funds so that officers of that original lending institution would not be permitted to get involved in the approval of the extension of credit if they had any connection with a builder who was getting funds from the mortgage company. In the instant matter, however, the government has not submitted to the jury substantial evidence to show that Central Penn retained enough control over these funds so that officers of Central Penn might be able to approve or disapprove loans which are made by its borrower, in this case Delaware Valley Mortgage and Realty Corporation. Although Delaware Valley submitted mortgages to Central Penn as security for the warehouse line, there is no evidence that Central Penn could influence Delaware Valley as to whom it granted its loans. Nor was there ever any evidence

produced that Mr. Schoenhut had anything to do with Central Penn's original granting of the extension of credit of $500,000 on the warehouse line to Delaware Valley or that the defendant was responsible in any way for the further extensions of credit to Delaware Valley. There was testimony to the effect that the defendant did not have the authority by himself to grant any such extension of credit in the amount of $500,000. All the defendant could do would be to present such request to Central Penn's loan committee (N.T. 3-72). In fact Mr. Jacobsen testified at trial that it was he who made the initial presentation to grant Delaware Valley an extension of credit for the first $500,000 (N.T. 3-71). Mr. Jacobsen further testified that during the spring of 1973 when the warehouse line was extended from one to two million dollars, he was the one to whom the request was made (N.T. 3-78).

Count III also states that the defendant knew that certain documents supplied to Central Penn National Bank by Karlee in connection with their loan were forged and contained materially false statements and information. As previously discussed under Count I there is no evidence that the defendant was aware of these false signatures. Even the government states in its memorandum "it is admitted that there is no direct evidence that defendant knew of the forgeries committed by Laut and LiTrenta at the direction of Inverso and Nirenberg." (Page 20). The government contends, however, that "a defendant may be convicted of a substantive offense which he did not personally commit if it is clear that the offense was committed in furtherance of a conspiracy of which he was a member." (Page 20). As was previously discussed

there was not sufficient evidence aside from the hearsay statements of Mr. Heimbecker that defendant in fact joined the conspiracy. Therefore, the knowledge of the admitted conspirators that certain documents contained false information cannot be imputed to Schoenhut. For the above reasons, I must grant defendant's motion for a judgment of acquittal as to Count III of the indictment.

COUNTS VI and VIII

[15] Counts VI and VIII allege violations of 18 U.S.C. §1005, which reads as follows:

"§1005. Bank entries, reports and transactions

Whoever, being an officer, director, agent or employee of any Federal Reserve bank, member bank, national bank or insured bank, without authority from the directors of such bank issues or puts in circulation any notes of such bank; or

Whoever, without such authority, makes, draws, issues, puts forth, or assigns any certificate of deposit, draft, order, bill of exchange, acceptance, note debenture, bond, or other obligation, or mortgage, judgment or decree; or

Whoever makes any false entry in any book, report, or statement of such bank with intent to injure or defraud such bank, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such bank or the Comptroller of the Currency, or the Federal Deposit Insurance Corporation, or any agent or examiner appointed to

examine the affairs of such bank, or the Board of Governors of the Federal Reserve System—

Shall be fined not more than $5,000 or imprisoned not more than five years or both."

Count VI reads as follows:

"On or about July 19, 1973 at Philadelphia, in the Eastern District of Pennsylvania, William F. Schoenhut, Jr. then being Assistant Vice President of Central Penn National Bank, a bank the deposits of which are insured by the Federal Deposit Insurance Corporation, did knowingly and wilfully, and with intent to defraud said bank, make and caused to be made a materially false report, statement, and entry into the books of said bank, in that William F. Schoenhut, Jr., authorized and caused to be granted a construction loan and an extension of credit, through the warehousing account of Delaware Valley Mortgage and Realty Corporation at Central Penn National Bank, to Karlee Corporation, well knowing that certain documents, including the construction loan agreement, submitted to Central Penn National Bank in connection with said loan and extension of credit, were forged, and fraudulently made, however, notwithstanding this, William F. Schoenhut, Jr. accepted these documents on behalf of said bank and authorized said loan. In violation of Title 18, United States Code, §§1005 and 2."

I have already determined that the government failed to submit substantial evidence to prove that there was in fact a loan from Central Penn to Karlee. I have also already determined that the government failed to submit

substantial evidence to prove that defendant Schoenhut was aware of forged documents in connection with the construction loan between Delaware Valley and Central Penn. Finally, I have heretofore determined that there was not substantial evidence presented to the jury upon which it could make a determination that Schoenhut joined a conspiracy formed by Pierce, Inverso, Nirenberg and Heimbecker. For these reasons I must also determine that the government has not submitted substantial evidence to prove the material allegations of Count VI beyond a reasonable doubt. Accordingly, I will grant defendant's motion for judgment of acquittal as to Count VI.

Count VIII reads as follows:

> "On or about November 23, 1973, at Philadelphia in the Eastern District of Pennsylvania, William F. Schoenhut, Jr., then being Assistant Vice President of Central Penn National Bank, a bank the deposits of which are insured by the Federal Deposit Insurance Corporation, did knowingly and unlawfully, with intent to defraud said bank, make a materially false report, statement and entry into the books of said bank, in that William F. Schoenhut, Jr., in his capacity as Assistant Vice President of Central Penn National Bank, supplied false information to said bank in a questionnaire supplied him by said bank, to wit: Schoenhut stated that he had no interest, financial or otherwise, in any company which borrowed money or was a customer of said bank, well knowing this statement to be untrue; Schoenhut further stated that he had not received any commissions, fees, etc. from any source other than said bank in

connection with any transaction to which said bank was a party, within the past year, well knowing this statement to be untrue; Schoenhut further stated that he had not acquired any stock or securities which were available to him only by reason of his employment with said bank, during the past year, well knowing this statement to be untrue. In violation of Title 18, United States Code, §1005."

Once again, I believe that my decision concerning Count I is controlling here. I will not repeat again but will recall the testimony of Mr. Jacobsen and Mr. Sommerville wherein each stated that construction loan agreements on the warehouse line were matters between Delaware Valley and its borrowers. Central Penn was not a party to those agreements. Even the admitted conspirators agreed to this. Nirenberg testified:

"Q The construction agreement that we have been discussing here today and that you have been asked about on direct examination was an agreement between what two parties?

A Karlee Corporation and Delaware Valley Mortgage and Realty Corporation.

Q. As far as you know, was Central Penn even mentioned in that agreement?

A Without reading it right now, not to my knowledge, sir.

Q And the lender was Delaware Valley, is that correct, sir?

A Yes, sir.

Q. The broker was Karlee?

A Yes, sir.

Q And that the funds to Karlee had to come from Delaware Valley?

A Yes, sir.

Q And there was a relationship between Karlee and Delaware Valley, wasn't there?

A Yes, sir.

Q But there was no relationship between Karlee and Central Penn, was there?

A No, sir."

(N.T. 2.87, 2.88)

Pierce testified similarly:

"Q Right. And now, sir, who were the parties to that construction loan agreement?

A Who were the parties to the construction loan? I believe it was Delaware Valley.

Q Delaware Valley?

A Yes.

Q Who was the other party?

A Karlee Corporation.

Q Now, there was nothing in that construction loan agreement that pertained to Central Penn, was there?

A I didn't see anything, no."

(N.T. 2.5)

I have personally examined government Exhibit No. 6, the construction loan agreement between Delaware Valley and Karlee, and have found no reference to Central Penn. Therefore, I will also grant defendant's motion for judgment of acquittal as to Count VIII of the indictment.

COUNT IX

[16] This is the conspiracy count. I have already granted defendant's motions for judgment of acquittal as to each of the substantive counts and I have previously decided that the government has not presented substantial evidence to prove that defendant Schoenhut joined the illegal conspiracy formed by Pierce, Inverso, Nirenberg and Heimbecker. Therefore, defendant's motion for judgment of acquittal as to Count IX will also be granted.

In sum, an order will be entered today granting defendant's motion for judgment of acquittal as to all Counts of the indictment under which he was charged, those Counts being numbers I, III, VI, VIII and IX.

Supreme Court, U. S.
FILED
OCT 20 1978
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No. 78-13

In the Supreme Court of the United States

OCTOBER TERM, 1978

WILLIAM F. SCHOENHUT, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

SIDNEY M. GLAZER
JOHN VOORHEES
Attorneys
Department of Justice
Washington, D.C. 20530

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 10a-47a) is reported at 576 F.2d 1010. The opinion of the district court (Pet. App. 48a-89a) is reported at 432 F.Supp. 470.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 1978. A petition for rehearing was denied on June 5, 1978. The petition for a writ of

certiorari was filed on July 3, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government may appeal a district court's judgment of acquittal entered after a jury has returned a guilty verdict.

2. Whether there was sufficient evidence to support petitioner's conviction.

STATEMENT

Following a trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was found guilty by a jury of receiving a fee for procuring a loan from a bank, in violation of 18 U.S.C. 215 (count 1); willful misapplication of bank funds, in violation of 18 U.S.C. 656 (count 3); submission of false documents to a bank, in violation of 18 U.S.C. 1005 (count 6); submission of false reports to a bank, in violation of 18 U.S.C. 1005 (count 8); and conspiracy, in violation of 18 U.S.C. 371 (count 9). Following the verdict, the district court granted a judgment of acquittal in favor of petitioner on all five counts (Pet. App. 48a-89a). On the government's appeal, the court of appeals vacated the district court's judgment of acquittal on counts 1, 8, and 9, with instructions to reinstate the jury's verdict of guilty (Pet. App. 47a).[1]

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[1] The court of appeals affirmed the district court's judgment of acquittal on count 3. The government did not appeal the district court's judgment of acquittal on count 6 (Pet. App. 12a n.1).

The government's evidence is summarized in the opinion of the court of appeals (Pet. App. 12a-23a). In 1972 and 1973 petitioner was an Assistant Vice President in the mortgage department of the Central Penn National Bank. Delaware Valley Mortgage and Realty Corporation, a firm which purchased mortgages from realtors and resold them to financial institutions, and also financed construction projects, was a customer of Central Penn (Pet. App. 13a). In 1972 and 1973 Delaware Valley obtained financing from Central Penn under a mortgage warehousing agreement that permitted it to withdraw funds from a $2 million "warehouse account" to purchase mortgages.[2] Petitioner was responsible for the proper operation of the Central Penn mortgage department, which controlled Delaware Valley's warehouse account (Pet. App. 15a). The bank reserved the right to reject any request by Delaware Valley for an advance

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[2] The court of appeals summarized the operation of Delaware Valley's warehouse account as follows (Pet. App. 14a-15a):

> At settlement on the purchase of a parcel of property, Delaware Valley would write out a check on the warehouse account, not to exceed its credit limit, to accomplish closing. This check, along with a demand collateral note in Central Penn's name, the mortgage agreement between Delaware Valley and the mortgagee, other required papers, and a commitment letter from a permanent lender indicating permanent financing for the project, would then be sent to the bank. Whenever the permanent lender purchased the mortgage from Delaware Valley, the Central Penn loan would be repaid, the mortgage transferred to the permanent lender, and the appropriate amount reinstated to the credit line.

from its warehouse account if that request was not supported by proper documentation (Pet. App. 29a).

In the spring of 1973, Heimbecker, Nirenberg, Inverso and Pierce, all officers or employees of Delaware Valley, decided to purchase and construct homes for their own personal profit on a tract of land then owned by the Karlee Corporation. Heimbecker suggested that the project be financed through the warehouse account at Central Penn and that petitioner be brought into the venture to facilitate the loan (2 A. 1.76-77; 3 A. 2.46-47, 2.49-50; 4 A. 3.23-24).[3] Petitioner inspected the building site and agreed with Heimbecker's proposal that the warehouse account be manipulated to finance the project (Pet. App. 15a-16a). Thereafter, they organized the Greenmeadow Holding Company; petitioner was given 10% of the stock of Greenmeadow although he made no capital contribution to the venture.[4] The others each received 22.5% of the stock (Pet. App. 16a).

On July 19, 1973, Greenmeadow obtained a construction loan of $1,495,400 from Delaware Valley and purchased the tract from Karlee with a check for $150,750 drawn on Delaware Valley's warehouse account. The documents evidencing this transaction

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[3] "A." refers to the government's appendix in the court of appeals.

[4] Heimbecker informed the others that petitioner's share of the stock was compensation for his efforts and assistance in obtaining financing for the Greenmeadow construction project (2 A. 1.76-78; 3 A. 2.49-50; 4 A. 3.24). Petitioner was later made an equal shareholder in the company (Pet. App. 16a-17a n.3).

were forged by persons purporting to be principals of Greenmeadow to prevent Delaware Valley's parent firm from discovering that Delaware Valley officials had a financial interest in Greenmeadow and had received a Delaware Valley loan (Pet. App. 17a). The documents were then forwarded to Central Penn's mortgage department for processing. While petitioner did not know that certain names on the documents were forged, he did know that the true principals of Grenmeadow were in fact officials of Delaware Valley (Pet. App. 17a). On July 20, 1973, Central Penn credited Delaware Valley's warehouse account with $150,750 as an advance on the first stage of the Greenmeadow construction loan (Pet. App. 18a).

Following a routine audit of Delaware Valley's warehouse account in September 1973, petitioner made various false statements to his superiors concerning certain lenders' commitment letters that were essential to continuation of Delaware Valley's warehouse line of credit at Central Penn (Pet. App. 18a-20a). In November 1973 petitioner, in response to a conflict of interest questionnaire distributed by the bank, stated that he did not have any interest, financial or otherwise, in any customer of the bank, that he had not received any gifts or benefits from any customer of the bank, and that he had not acquired any stock, securities or property because of his employment with the bank (Pet. App. 21a).

Central Penn advanced $620,000 to the Greenmeadow project through the Delaware Valley ware-

house line from July 1973 until the fraud was discovered in August 1974 (Pet. App. 18a).

ARGUMENT

1. Petitioner contends (Pet. 11-17) that the Double Jeopardy Clause precluded the government's appeal in this case because the district court granted a judgment of acquittal following the jury's verdict of guilty.[5] This claim was properly rejected by the court below (Pet. App. 23a n.7).

The Double Jeopardy Clause "was primarily 'directed at the threat of multiple prosecutions' and posed no bar to Government appeals 'where those appeals would not require a new trial.'" *United States* v. *Scott*, No. 76-1382 (June 14, 1978), slip op. 3; *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977); *United States* v. *Wilson*, 420 U.S. 332, 346 (1975). A government appeal is therefore permissible if a reversal would not necessitate a new trial or further fact-finding proceedings. *United States* v. *Scott, supra; United States v. Martin Linen Supply Co., supra*, 430 U.S. at 570; *United States* v. *Jenkins*, 420 U.S. 358, 370 (1975). Although the Court has never been squarely presented with the issue, on a number of occasions it has expressly stated that "* * * where the jury returns a verdict of guilt but the trial court thereafter enters a judgment of acquittal an appeal is permitted." *United States* v. *Jenkins, supra,*

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[5] The same issue is presented in *Clark* v. *United States*, No. 78-5114. We are sending petitioner a copy of our brief in opposition in that case.

420 U.S. at 365; *United States* v. *Scott*, *supra*, slip op. 8. See also *United States* v. *Wilson*, *supra*, 420 U.S. at 344-345, 352-353.

This conclusion does not conflict with the Double Jeopardy Clause's purpose of shielding defendants from multiple prosecutions, "[s]ince reversal on appeal would merely reinstate the jury's verdict * * *." *United States* v. *Wilson*, *supra*, 420 U.S. at 344-345. It in no way affords the prosecution a second opportunity to supply evidence or gives it a "second bite at the apple." *Burks* v. *United States*, No. 76-6528 (June 14, 1978), slip op. 16. The appealability of post-guilty-verdict acquittals is also supported by the uniform holdings of the courts of appeals. See, *e.g.*, *United States* v. *Burroughs*, 564 F.2d 1111, 1117-1119 (4th Cir. 1977); *United States* v. *Cahalane*, 560 F.2d 601, 603 n.2 (3d Cir. 1977), cert. denied, 434 U.S. 1045 (1978); *United States* v. *Ramos*, 558 F.2d 545, 546 (9th Cir. 1977); *United States* v. *Rojas*, 554 F.2d 938 (9th Cir. 1977); *United States* v. *Hemphill*, 544 F.2d 341, 343 (8th Cir. 1976), cert. denied, 430 U.S. 967 (1977); *United States* v. *Cravero*, 530 F.2d 666, 670-671 (5th Cir. 1976); *United States* v. *De Garces*, 518 F.2d 1156, 1159 (2d Cir. 1975).

In the present case, the jury returned a guilty verdict and the district court granted petitioner's motion for a judgment of acquittal based upon its view that the government had failed to prove guilt. The court of appeals examined the evidence in detail and ordered reinstatement of the guilty verdict (Pet.

App. 47a).[6] No retrial is necessary. Therefore petitioner has no claim of double jeopardy. *United States* v. *Jenkins, supra; United States* v. *Scott, supra.*

Petitioner to the contrary (Pet. 14-17), the fact that the district court has not yet ruled on petitioner's motions for a new trial and arrest of judgment is irrelevant. The district court's response to such motions involves an appraisal of alleged trial error, not further fact finding, and cannot be equated with a second trial.[7]

2. Petitioner contends (Pet. 17-18) that there was insufficient evidence to support the verdict on count 1 for receiving a fee as a bank official for procuring a loan from his bank, in violation of 18 U.S.C. 215. Specifically, he argues that the court of appeals based its conclusion of guilt on petitioner's conceded failure to reveal his interest in the Greenmeadow venture. He also states, without much elaboration (Pet. 9 n.*), that if there is insufficient evidence to support the verdict on count 1, the evidence would be insufficient on count 8, the count charging the making of false statements in the bank's questionnaire, and on count 9, the conspiracy count. However, as the court below concluded in a detailed review of the evidence, upon which we rely (Pet. App. 24a-36a, 40a-47a), the evidence amply supported the verdict.

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[6] See note 1, *supra.*

[7] This Court has rejected petitioner's argument (Pet. App. 11-13) that the government may not appeal a judgment of acquittal under Rule 29(c), Fed. R. Crim. P. *United States* v. *Martin Linen Supply Co., supra,* 430 U.S. at 568.

It is clear, for the reasons stated in the opinion of the court of appeals, that a loan was in fact made by Central Penn to Delaware Valley for the benefit and use of the Greenmeadow principals' construction project. There were extensions of credit on the warehouse line to Delaware Valley that were not mechanical or automatic, since the bank imposed stringent requirements for adequate documentation on each request for funds. The mortgage department, under petitioner's supervision, had the responsibility to assess, and the power to reject, any request. Notwithstanding petitioner's contention to the contrary (Pet. 18), the record reveals that the bank did have contractual power to exercise control over Delaware Valley's warehouse account (Pet. App. 30a n.11). The bank had complete control over the warehouse line, and the transaction between Central Penn and Delaware Valley was a loan with all of its characteristics (*ibid.*). Indeed, Central Penn treated the funds that were advanced on the warehouse lines as a loan. As the court of appeals also noted, the mortgage department had a loan policy manual, written by petitioner, that applied to loans made on the warehouse lines. Significantly, it provided for inspection of construction sites of companies that received loans on the warehouse lines (Pet. App. 20a n.6). Any deviations from these procedures would have to be approved by petitioner (*ibid.*).[8]

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[8] Petitioner argues (Pet. 18) that the court of appeals incorrectly relied on this manual because it was written after the alleged violations occurred. The evidence, however, shows

There was ample evidence that petitioner procured the loan from Central Penn to the Greenmeadow principals, in violation of 18 U.S.C. 215. From his supervisory position in the mortgage department of the bank, petitioner knew of the lack of capital in the Greenmeadow project and the true identities of its officers. His acceptance of Greenmeadow stock gave him a financial interest in the outcome of the loans, an interest that he disclosed to no one at the bank. Moreover, petitioner gave financial advice to the Greenmeadow principals concerning the use of the warehouse account to secure the loans for Greenmeadow. In addition to this evidence of misconduct, there was testimony that petitioner was rewarded with stock in Greenmeadow for his help in securing the loan (Pet. App. 43a n.16). In sum, by his own action and concealment, petitioner successfully endeavored to secure funds for Greenmeadow through Delaware Valley's warehouse account with the bank.[9]

Finally, there was ample evidence to support petitioner's conviction on count 8 (making false statements as an officer to the bank), since petitioner re-

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that the loan manual was prepared by petitioner and issued on May 1, 1974 (1 A. 0-217-227). Central Penn advanced a total of $619,250 to the Greenmeadow project through Delaware Valley's warehouse account until September of 1974 (4 A. 3-145).

[9] Petitioner suggests that Central Penn might have condoned the transaction if petitioner's interest in Greenmeadow was disclosed (Pet. 18). This argument is irrelevant given the fact that there was sufficient evidence that petitioner endeavored to procure a loan in violation of 18 U.S.C. 215.

sponded falsely to question 6 on the questionnaire, distributed by the bank, that he had not acquired any stock made available to him by reason of his employment with the bank.[10] Noting that there was testimony that Heimbecker made a gift of the Greenmeadow stock to petitioner, the court of appeals correctly ruled that the jury could have inferred that petitioner knew that the stock he received was compensation for procuring the loan or a gift because of his crucial position in the mortgage department of the bank (Pet. App. 42a-43a).

The evidence also showed that petitioner actively participated in the conspiracy by agreeing to procure a loan from the bank for the Greenmeadow project (count 9). Not only did petitioner have substantial dealings with the other co-conspirators, advising them how to finance the Greenmeadow project by manipulating the Delaware Valley warehouse account, but he was given an equal membership in their corporation and an opportunity to share the profit of their business venture. Petitioner's active assistance in procuring the loan and his stake in the business venture fully support his conspiracy conviction. *Direct Sales Co.* v. *United States*, 319 U.S. 703 (1943).

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[10] It is also clear that petitioner responded falsely to question 1 on the questionnaire when he stated that he did not have an interest, financial or otherwise, in a customer of the bank, and to question 5, when he stated that he had not received a gift from a customer of the bank.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

SIDNEY M. GLAZER
JOHN VOORHEES
Attorneys

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